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**12/06/95: CARP: DISTRIBUTION OF 1990, 91, & 92 CABLE ROYALTY FUNDS**

**PAGE 358 TO PAGE 638**

**NEAL R. GROSS & CO., INC.**

**(202) 234-4433**

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**CONDENSED TRANSCRIPT AND CONCORDANCE  
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## Page 358

BEFORE THE  
COPYRIGHT ARBITRATION ROYALTY PANEL  
LIBRARY OF CONGRESS  
DISTRIBUTION OF 1990,  
1991 AND 1992  
CABLE ROYALTY FUNDS  
Hearing Room 414, Fourth Floor  
Madison Building  
Library of Congress  
101 Independence Avenue, S.E.  
Washington D.C.  
Wednesday, December 6, 1995  
The above-entitled matter came on for hearing,  
pursuant to notice, at 9:30 a.m.  
BEFORE:  
THE HONORABLE MEL R. JIGANTI, Chairperson  
THE HONORABLE JOHN B. FARMAKIDES  
THE HONORABLE RONALD WERTHEIM

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WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
Peter Lemieux				
By Mr. Lane	375			
By Mr. Stewart	436			
By Mr. Hester	456			
By Mr. Cosentino	474			
By Mr. Newman			493	
Paul I. Bortz				
By Mr. Gersch	509			
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VOIR DIRE BY MR. GOTTFRIED ON PAGE 579				
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Received	Description			
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7-X	List of 59 "flagships"	396		
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10-X	SA 162	473		
National Association of Broadcasters				
1-X	Cable Data Corp. Reports	447		

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(1) P-R-O-C-E-E-D-I-N-G-S  
(2) (9:47 a.m.)  
(3) WHEREUPON,  
(4) PETER H. LEMIEUX (5) HAVING  
BEEN PREVIOUSLY SWORN,  
RESUMED THE WITNESS (6) STAND,  
WAS EXAMINED AND TESTIFIED AS  
FOLLOWS:  
(7) CHAIRPERSON JIGANTI: This is  
day two of (8) the proceedings. Let the  
record show that we're (9) proceeding  
with Dr. Lemieux with cross  
examination by (10) Mr. Lane.  
(11) And if Mr. Lane doesn't mind too  
much, I (12) do have a question for Dr.  
Lemieux based on his (13) testimony

yesterday. Your indulgence, Mr. Lane.  
(14) Dr. Lemieux, there is something  
I'm a (15) little confused about. On  
page 30 of your testimony, (16) you  
have a table there, 10-2, "Average  
Number of (17) Signals Carried by  
Signal Type."  
(18) THE WITNESS: Yes.  
(19) CHAIRPERSON JIGANTI: Now  
those are (20) signals related to distant  
signals.  
(21) THE WITNESS: That's right.  
(22) CHAIRPERSON JIGANTI: Now, it  
says there (23) that "Networks have, on  
the average, .30 of networks." (24) What  
networks are you referring to?  
(25) Are you referring to networks  
excluding

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(1) CBS, NBC and ABC or including  
that?  
(2) THE WITNESS: I'm referring to  
network (3) affiliated local stations that  
are carried as distant (4) signals.  
(5) CHAIRPERSON JIGANTI: So that  
- the thing (6) I don't understand is that  
in the top 50 market, not (7) every  
station carries CBS, NBC and ABC?  
(8) THE WITNESS: No, they do. And  
some of (9) them also carry - some of  
those - and some network (10) affiliated  
stations as distant signals as well.  
(11) CHAIRPERSON JIGANTI: Well,  
that - and (12) by your definition then -  
(13) THE WITNESS: I believe D.C. is an  
example (14) of that where the three  
Baltimore affiliated stations (15) are also  
carried in the District on District (16)  
Cablevision.  
(17) CHAIRPERSON JIGANTI: All right.  
So would (18) that be - bring up the  
average here?  
(19) THE WITNESS: That would be -  
(20) CHAIRPERSON JIGANTI: That  
would be -  
(21) THE WITNESS: That would be an  
instance of (22) three for that system.  
(23) CHAIRPERSON JIGANTI: Point -  
that would (24) be 3, not .3.  
(25) THE WITNESS: That's right.

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(1) CHAIRPERSON JIGANTI: But in a  
lot of - (2) in most, then, of the top 50  
stations do not carry all (3) three of the  
network affiliates?  
(4) THE WITNESS: No, they carry -  
they are (5) required to carry - they  
used to be required to carry (6) the local  
stations in Washington.  
(7) CHAIRPERSON JIGANTI: Okay.  
(8) THE WITNESS: On the District  
cable (9) system, they carry the three  
Washington D.C. network (10) affiliates:  
the CBS affiliate, the NBC affiliate and  
(11) the ABC affiliate. Those are all  
carried as local, (12) and they are not

compensated in this proceeding.

(13) CHAIRPERSON JIGANTI: Yes.

(14) ARBITRATOR WERTHEIM:

They're carried by (15) FCC requirements?

(16) THE WITNESS: Yes, I think that - I'm not (17) exactly certain about what the status of the most (18) carriage is these days. They've gone through some (19) litigation, but -

(20) ARBITRATOR WERTHEIM: If I could just (21) interject here, one of the things that we keep showing (22) with this interplay between the requirements of Title (23) XVII and FCC requirements.

(24) THE WITNESS: Yes.

(25) ARBITRATOR WERTHEIM: And you all may be

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(1) totally familiar with all of the FCC requirements and (2) would prefer shorthand at 76.65 or whatever. But I (3) think you should assume that we are not familiar.

(4) THE WITNESS: Right.

(5) ARBITRATOR WERTHEIM: And it's important (6) for us to distinguish what's required by the FCC and (7) what's required by our statute.

(8) THE WITNESS: I'm not an expert on what (9) the current status of the FCC regulations are in (10) regard to carriage. And in the old regime, whenever (11) that was, operators were required to carry all locally (12) licensed stations.

(13) That is, if there's - if I'm a cable (14) system and I'm within 35 miles of a local broadcast (15) station, under the old FCC rules - and as far as I (16) know, these rules are still in effect, I think, but (17) I'm not positive about this.

(18) Then I would be required to carry all (19) those broadcast signals that I'm within 35 miles of.

(20) And it is the case that, in some (21) instances, cable operators also carry distant network (22) affiliated stations.

(23) That is, they carry an ABC, CBS or NBC (24) affiliated station from outside of their local market, (25) as here where the three Baltimore affiliated stations

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(1) are also carried on District Cablevision.

(2) So that people in Washington D.C. actually (3) have two CBS, two NBC and two ABC stations on their (4) local cable system, one that's local and one that's (5) distant and imported.

(6) CHAIRPERSON JIGANTI: So that on your (7) chart here -

(8) THE WITNESS: Right.

(9) CHAIRPERSON JIGANTI: - is that is only (10) for the imported?

(11) THE WITNESS: That's correct.

(12) CHAIRPERSON JIGANTI: So that in a - (13) Memphis I think it was yesterday.

(14) THE WITNESS: Nashville or whatever the (15) other -

(16) CHAIRPERSON JIGANTI: Yes, okay. All (17) right, in Nashville, would the station down there (18) have, as part of its basic package CBS, NBC and ABC (19) typically?

(20) THE WITNESS: Yes.

(21) CHAIRPERSON JIGANTI: All right. Now - (22) and just about every package in the top 50 would have (23) those, would they not?

(24) THE WITNESS: Almost, by definition, yes.

(25) CHAIRPERSON JIGANTI: All right. Now, but

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(1) that is not reflected in what you have here listing (2) networks.

(3) THE WITNESS: Right, I'm only considering (4) distant signals here.

(5) CHAIRPERSON JIGANTI: All right. Now, how (6) - you're only considering distant signals, so - but (7) a network provides distant signals, does it not? It's (8) not compensated for it, but it provides distant - I (9) mean, it's the source of distant signals, correct?

(10) THE WITNESS: No.

(11) CHAIRPERSON JIGANTI: I mean, a network - (12) I'm sorry, a -

(13) THE WITNESS: The network -

(14) CHAIRPERSON JIGANTI: - a station.

(15) THE WITNESS: A network affiliated (16) station?

(17) CHAIRPERSON JIGANTI: Yes.

(18) THE WITNESS: I guess I'm not entirely (19) clear on the question here. If -

(20) CHAIRPERSON JIGANTI: Let me withdraw it (21) because I don't think it's leading anywhere. But the (22) significance is, and your statistics here that the (23) networks you include would be distant signal networks, (24) even though they're a network affiliate.

(25) THE WITNESS: They are distant signal

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(1) broadcast stations -

(2) CHAIRPERSON JIGANTI: Broadcast stations.

(3) THE WITNESS: - that are affiliated with (4) one of the three major networks.

(5) CHAIRPERSON JIGANTI: All right. Now - (6) well, I guess I'll save it for Dr. Bortz because he (7) has a channel on it - I mean, a testimony on pages (8) ten and 11, and it sort of confuses me along those (9) same lines.

(10) But I think I'm pretty sure - Mr.

Lane, (11) subject to -

(12) ARBITRATOR FARMAKIDES: I, too, am (13) confused by this testimony on page 30, your Table 10- (14) 1. In the body of your text, your testimony, you talk (15) about Table 10-1 presenting average number of distant (16) signals.

(17) THE WITNESS: That's right.

(18) ARBITRATOR FARMAKIDES: That, to me, (19) suggests something that I've learned from you all the (20) last couple of days. In your table, you identify it (21) as the average number of signals.

(22) You did not distinguish between distant (23) signals and signals.

(24) THE WITNESS: Right.

(25) ARBITRATOR FARMAKIDES: First of all -

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(1) THE WITNESS: But that's a -

(2) ARBITRATOR FARMAKIDES: - how do you (3) rationalize that?

(4) THE WITNESS: The title should say (5) "Distant Signals."

(6) ARBITRATOR FARMAKIDES: Oh, it should.

(7) THE WITNESS: I mean, how do I decide what (8) constitutes being a distant signal?

(9) ARBITRATOR FARMAKIDES: Yes.

(10) THE WITNESS: Well, the FCC rules that say (11) that if the station is -

(12) ARBITRATOR FARMAKIDES: So you're using (13) FCC rules. I'm clear now. That's all that -

(14) THE WITNESS: Well, the operators file (15) these statements of account -

(16) ARBITRATOR FARMAKIDES: Yes.

(17) THE WITNESS: - that we went through (18) yesterday. They are using the FCC rules -

(19) ARBITRATOR FARMAKIDES: All right.

(20) THE WITNESS: - when they distinguish (21) between what's a local and a distant station for the (22) copyright purposes.

(23) ARBITRATOR FARMAKIDES: Okay.

(24) THE WITNESS: And the rule is, if the (25) system is outside the 35 mile zone of the broadcast

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(1) station, then it's considered to be distant.

(2) ARBITRATOR FARMAKIDES: In this table, (3) other than average - when you come up with an average (4) number, okay, you're talking about an average number (5) of what?

(6) THE WITNESS: Let's suppose there were 100 (7) top - 100 cable

systems in the top 50, and 30 of them (8) carried a distant network affiliate. Then we would (9) get an average of .3. (10) MR. NEIMAN: Just to clear up one thing (11) related to your question, Your Honor. Dr. Lemieux, (12) the data that's reflected in this table, that's based (13) on the information provided by the cable operators?

(14) THE WITNESS: Yes.

(15) MR. NEIMAN: When they file their (16) statements with the Copyright Office?

(17) THE WITNESS: As we saw yesterday on Form (18) 3, they have to distinguish is this a local or a (19) distant signal for each one they carry?

(20) MR. NEIMAN: Okay, and you -

(21) CHAIRPERSON JIGANTI: Thank you.

(22) ARBITRATOR WERTHEIM: I'm just trying to (23) understand the numbers here in your table. For (24) example, under "Other Shipper Stations," the top 50 (25) you had .12.

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(1) Does that figure mean that 12 percent of (2) the stations in the top 50 markets carry signals from (3) other superstations, or does it mean something else?

(4) THE WITNESS: No, it may be somewhat - it (5) may not necessarily mean that if they carried more (6) than one, since there are four signals in that (7) category.

(8) Some systems would carry two, other (9) superstations, for instance.

(10) So it can't be seen purely as a percentage (11) because -

(12) ARBITRATOR WERTHEIM: Well, what does it (13) mean? What does the "0.12" signify?

(14) THE WITNESS: Suppose that there were - (15) we had 100 cable systems in the top 50 markets. We (16) have many more, obviously, but just for purposes of (17) discussion.

(18) And if, let's say - get the number to get (19) .12 here. Let's say that of those, eight carried one (20) other original superstation, and two carried two other (21) superstations. Then we would get 12 instances of (22) carriage averaged across the 100 systems.

(23) It's likely to be the case that for these (24) categories - for example, if we look at the original (25) superstation column, okay, clearly that number is

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(1) much bigger than one.

(2) It's closer to two, which suggests that, (3) on average, a cable system in the top 50 market (4) carries close to two of the three original (5) superstations on average.

(6) There are some that carry only one or -

(7) ARBITRATOR WERTHEIM: This is the average (8) carried by any single cable system.

(9) THE WITNESS: Right. Basically, it's (10) computed by taking all the instances of original (11) superstation carriage in the top 50 markets, and (12) dividing by the number of cable systems in the top 50 (13) markets.

(14) And that turns out to be 1.76.

(15) ARBITRATOR WERTHEIM: Okay. But these (16) numbers all refer to the average number of distant (17) signals in various categories carried by any one cable (18) system?

(19) THE WITNESS: Carried by the average cable (20) system.

(21) ARBITRATOR WERTHEIM: Yes, but a single (22) average. It's not some aggregate number.

(23) THE WITNESS: That's right.

(24) CHAIRPERSON JIGANTI: If I could stay on (25) this for just a moment longer -

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(1) THE WITNESS: Sure.

(2) CHAIRPERSON JIGANTI: - I'm going to do (3) something I said I wouldn't do. I'm going to do it (4) with Dr. Bortz.

(5) He uses "mile high" as an example. And he (6) says for the basic service, they carry three stations: (7) CNC, RMA and MGH, and those are the NBC, CBS and the (8) ABC is KTCI or KUSA.

(9) But those are listed there as local (10) broadcast, so those are the local - so that wouldn't (11) be computed in your average of distant signals.

(12) THE WITNESS: Right, they're not (13) compensable here.

(14) CHAIRPERSON JIGANTI: Now on the expanded (15) basis, they have a CNBC, and that's - would that then (16) be the distant station?

(17) THE WITNESS: No, CNBC is a cable network (18) that's owned by NBC. It's like - it's like TNT or (19) MTV or one of the ones we talked about yesterday - (20) ESPN.

(21) CNBC is another cable network like -

(22) CHAIRPERSON JIGANTI: It's possible though (23) to carry NBC as both the local broadcast as CKNC and (24) as a distant signal through another city or something.

(25) THE WITNESS: That's true.

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(1) CHAIRPERSON JIGANTI: Okay.

(2) THE WITNESS: CNBC, on the other hand, is (3) not NBC's regular network programming. It's an (4) entirely separate service with entirely

different (5) programs.

(6) CHAIRPERSON JIGANTI: Okay. Thanks, (7) Doctor.

(8) Mr. Lane, that was a long preliminary. (9) I'm sorry. Go ahead.

(10) MR. LANE: No problem.

(11) CHAIRPERSON JIGANTI: You may proceed.

(12) MR. LANE: Thank you. Would you turn to (13) page five of your testimony, please? And the top (14) chart in that lists the number of cable systems, does (15) it not?

(16) THE WITNESS: Yes.

(17) CONTINUED CROSS EXAMINATION

(18) BY MR. LANE:

(19) Q And that number - let's just say with (20) 92.2, 13,291 is the total number of cable systems in (21) the United States that reported royalties during that (22) period, correct?

(23) **A As of the date of the day I had them -**

(24) Q And each of those filed one of these (25) statements of account?

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(1) **A One of the other one, yes.**

(2) Q Yes. And that was where the information (3) was taken by Larson and you took that and then, in (4) turn, came up with this chart, right?

(5) **A Yes.**

(6) Q Now for the rest of your testimony, you're (7) only concerned, are you not, with the line entitled (8) "Form 3," which is 2,236 systems?

(9) **A That's correct.**

(10) Q Okay. Now could we turn to page ten of (11) your testimony? Do you have that? And just keep page (12) five - keep your finger on that as well.

(13) **A Are you going to ask me while there are (14) six systems?**

(15) Q Well, I wasn't going to ask you that (16) because that's going to be a little - I know why it (17) is, but - this chart shows what you call, "instances (18) of carriage," right?

(19) **A Yes.**

(20) Q Now let's say I want to take a simple (21) example, and I've got my Form 3, and I'm a Form 3 (22) system. I'm just one system and I'm filing out my - (23) I'm filling out my page number three where I list my (24) calls signs and my stations.

(25) Now let's say that I just happen to put

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(1) down WTBS, WGN and WWOR on my state, net of account and (2) they're all distant, okay? Do you have that in mind?

(3) **A Sure.**

(4) Q How many instances of carriage

do I have (5) in that situation?

(6) **A By my count, three.**

(7) Q Three instances of carriage. So if I took (8) - if I took the number down here, you have - at the (9) bottom, you have a total of 7,377, and those are (10) instances of carriage, right?

(11) **A Yes.**

(12) Q But in this case, you've identified 2,242 (13) cable systems.

(14) **A Yes.**

(15) Q So you have inferred from that that the (16) average cable system, Form 3 in 1992-2 carried three - (17) - nearly three and a third distant signals, right?

(18) **A Yes, the ratio of -**

(19) Q It's 3.29.

(20) **A Yes.**

(21) Q Exactly. So obviously, some carried four (22) or five, some carried two.

(23) **A Right.**

(24) Q But you added all those up and you just (25) divided it out?

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(1) **A Right.**

(2) Q Okay. Then, you didn't really give a (3) total on page - well, you - well, actually you did (4) do a total and that's the 331 is, for all practical (5) purposes, comparable to this 329 on page ten. Is that (6) correct?

(7) **A Yes.**

(8) Q So what you did is a cable system doesn't (9) just carry one distant signal in most cases. Is that (10) right?

(11) **A Generally speaking, right.**

(12) Q So they carry two, they carry three. And (13) in our parlance, we've always called that instances of (14) carriage, right?

(15) **A Yes.**

(16) Q You're not the first person that thought (17) that up -

(18) **A Not at all.**

(19) Q - or not the only person that's ever used (20) that?

(21) **A No.**

(22) Q And so you're division, if we go back to (23) page 30, the 3.31 means that of the 2,242 systems (24) carried something in the order of 7,400 different (25) distant signals only?

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(1) **A Yes.**

(2) Q Okay. And in addition, they may have (3) carried a whole bunch of local signals. And you (4) haven't counted that in here, have you?

(5) **A Not at all.**

(6) Q And they may have carried a whole bunch of (7) cable networks like ESPN and MTV and CNN and CNBC and (8) a whole bunch of pay systems: HBO, Showtime, all of (9) that, Pay Per

View.

(10) None of that is in this chart, is it?

(11) **A That's correct**

(12) Q All this is limited to is that very (13) limited area of distant signals?

(14) **A That's correct.**

(15) Q And those are identified by the cable (16) system on page 30 of the statement of account, Form 3, (17) putting "yes" if they think it's distant, correct?

(18) **A Yes, it is page 30.**

(19) Q There's a column there and it says (20) "distant" and they mark it "yes."

(21) **A Right.**

(22) Q And all you've done is just sort of (23) reported all that and shuffled it in various was that (24) you put in here and come up with these numbers?

(25) **A That's correct.**

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(1) Q Now if we look at page 30, for example, we (2) see as - well, let's talk about the top 50 markets. (3) That's like New York, L.A., Chicago and so on down the (4) markets.

(5) How are the markets ranked? Can you tell (6) us that? How do you get to be in the top 50 markets? (7) What's the definition of it?

(8) **A Well primarily, it's by population size.**

(9) Q Okay. So the top 50 markets are (10) essentially the ones that have the most population, (11) correct?

(12) **A That's correct.**

(13) Q And then the second 50 markets are the (14) ones that have -

(15) **A The next set of rankings.**

(16) Q - the next - okay. And there are lists (17) of these rankings in various places around that are (18) readily available, correct?

(19) **A Yes.**

(20) Q And then, could you tell us what a (21) "smaller market" means?

(22) **A It means markets that are between rank 101 (23) and whatever the bottom of the rankings are, which is (24) in the low 200's.**

(25) Q So there are about 210, 220 -

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(1) **A Something like that.**

(2) Q - markets in the United States, right?

(3) **A Right around the - right, yes, overall.**

(4) Q Overall.

(5) **A And about 120 of them are smaller.**

(6) Q Right. So all the markets that are 101 to (7) 220, or whatever the exact number is, are considered (8) a smaller market?

(9) **A That's correct.**

(10) Q And -

(11) ARBITRATOR WERTHEIM: What are these (12) numbers you're referring to: 101 and 220?

(13) MR. LANE: Market size.

(14) THE WITNESS: The rank of each market.

(15) MR. LANE: The top 50, the second 50, then (16) 101 to 220 is the smaller.

(17) ARBITRATOR WERTHEIM: Okay.

(18) BY MR. LANE:

(19) Q Okay. And what other characteristic do (20) all these 220 markets have in common that the outside (21) all markets don't have? They have a television (22) station, don't they?

(23) **A Yes, they have a local broadcast station.**

(24) Q Right. So "outside all markets" means an (25) area that doesn't have a television station, doesn't

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(1) it?

(2) **A Yes, it's a cable system that's more than (3) 35 miles from any broadcast station.**

(4) Q Right. So it's not considered to be (5) inside a television market.

(6) **A Right.**

(7) Q And that was an important consideration, (8) was it not, for the FCC rules about how many signals (9) you could carry?

(10) **A Yes. Those systems were exempt from the (11) carriage rules.**

(12) Q In other words, they could have carried in (13) 1972 or 1976 or 1979, any time that the FCC rules (14) applied, they could have carried as many signals as (15) they wanted?

(16) **A That's correct.**

(17) Q But all the other people that were inside (18) a top 50 or a second 50 or smaller, they all had (19) limitations on how many they could carry, right?

(20) **A That's right. Under the old rules, yes.**

(21) Q Under the old rules. So now when we look (22) at your chart here, we kind of see that in play as you (23) go down the chart, the averages become bigger, (24) generally speaking. Isn't that correct?

(25) **A That's true.**

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(1) Q And the Chairman's question about you have (2) only .3 network in the top 50 market, but if you go (3) down in the smaller and outside, you see you have over (4) one.

(5) **A That's correct.**

(6) Q And that's because in a lot of those (7) markets, they might only have two affiliate stations (8) or one or they have combinations or -

(9) **A** I don't know, but they're eligible to (10) carry an additional – they have chosen to carry (11) additional networks and they may have been eligible to (12) do so. (13) **They may be carrying them at the 3.75 (14) rate.**

(15) **Q** And that's part of what you saw in one of (16) your charts that the smaller markets carried more of (17) the 3.75 signals?

(18) **A** That's correct.

(19) **Q** And that's because, in some sense, they (20) already had those signals and they wanted to continue (21) to carry – I'm sorry, the smaller markets, they had (22) the tightest restrictions, did they not on what they (23) could carry?

(24) **A** Yes.

(25) **Q** So their permitted signals was the

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(1) smallest of the market?

(2) **A** Yes.

(3) **Q** Okay. So that's one reason why they have (4) 3.75 signals.

(5) **A** That's a reason, yes.

(6) **Q** Okay.

(7) **ARBITRATOR WERTHEIM:** Just to go back (8) briefly, I think it's fairly clear. But your Table 5- (9) 1 on page ten, "Distribution is to be carried by type (10) of signal," those are all distant signals?

(11) **THE WITNESS:** All distant signals. I (12) don't believe there's a figure in this report that (13) refers to a local signal at all.

(14) **BY MR. LANE:**

(15) **Q** Now it's true, is it not – maybe this is (16) part of the confusion. WTBS is a local signal in (17) Atlanta, correct?

(18) **A** Yes.

(19) **Q** But you don't count that. Even if they're (20) 150 cable systems in the Atlanta market carrying WTBS (21) as a local signal, not one of those goes in here, did (22) it?

(23) **A** Unless the operator misclassified it in (24) this form.

(25) **Q** But I'm assuming they didn't.

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(1) **A** Right.

(2) **Q** So all these stations are local signals in (3) their local market where they go out over the antenna, (4) right?

(5) **A** Right, WGN in Chicago and WWOR in New (6) York.

(7) **Q** Right. But you've counted none of those (8) local carriages.

(9) **A** That's correct.

(10) **Q** And these are only where they're in (11) markets that they have to get to that they're distant?

(12) **A** Yes.

(13) **Q** Okay. And again, just sticking with Table (14) 3, you've only identified this for the Form 3 systems, (15) correct?

(16) **A** Three?

(17) **Q** I'm sorry, page ten, Table 5-1.

(18) **A** Right. Yes, these are only for Form 3 (19) systems.

(20) **Q** And why did you limit yourself to Form 3 (21) systems?

(22) **A** Two reasons: 1) as we saw the other day, (23) it's not here right now, they constitute 97 percent or (24) so of the total royalty pool. And the other reason is (25) somewhat more technical.

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(1) That is, it's only those systems that we (2) can deduce from the statements of account how signal (3) carriage contributed to royalty payments by this DSE (4) allocation business that we talked about yesterday.

(5) **Q** So the Form 1 systems just pay \$28 and –

(6) **A** Right, and they don't tell us anything.

(7) **Q** They don't tell us whether a signal is (8) distant or local –

(9) **A** Right.

(10) **Q** – and it's not really worth our time to (11) look up \$28, whether this is a distant or local (12) station.

(13) **A** Right.

(14) **Q** The same with the Form 2 systems, they (15) just play a flat percent and they can 100 or they can (16) carry one –

(17) **A** Right.

(18) **Q** – and it's the same percentage.

(19) **A** Right. They do list the stations, but (20) they don't indicate whether they're distant or local.

(21) **Q** Right. So only those Form 3's have that (22) column that say "distant or local, yes, no?"

(23) **A** Yes.

(24) **Q** Okay. Are there any other questions that (25) – are there any other areas that you would like me to

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(1) explore here?

(2) **CHAIRPERSON JIGANTI:** I think a lot of (3) them later on, but not right now.

(4) **MR. LANE:** Okay.

(5) **ARBITRATOR FARMAKIDES:** Well, I thank you (6) very much for that. That clarified a number of (7) things. You said one thing, Mr. Lane, and you (8) responded, Dr. Lemieux, with respect to WTBS in (9) Atlanta, what was your question relating to the fact (10) that it is an Atlanta local station?

(11) **MR. LANE:** In Atlanta, it is a local.

(12) **ARBITRATOR FARMAKIDES:** In Atlanta – in (13) Atlanta, it is a local. But elsewhere, it is not. It (14) would be a distant signal.

(15) **MR. LANE:** Correct. And just the same as (16) – isn't it true, Dr. Lemieux, that just the same way, (17) WGN in Chicago –

(18) **THE WITNESS:** Yes.

(19) **BY MR. LANE:**

(20) **Q** – is a local station in Chicago and WWOR (21) is a local station in New York? Every station is (22) local in its own market?

(23) **A** Yes.

(24) **ARBITRATOR FARMAKIDES:** But it would be – (25) it would be, in your Table 5 and also in Table 10, it

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(1) would be a distant signal in markets anywhere other (2) than Atlanta.

(3) **THE WITNESS:** Anywhere outside of –

(4) **ARBITRATOR FARMAKIDES:** And you have (5) marked – you have calculated that as being a distant (6) signal?

(7) **THE WITNESS:** Yes.

(8) **ARBITRATOR FARMAKIDES:** Thank you.

(9) **BY MR. LANE:**

(10) **Q** And you've excluded all the cases where it (11) was a local signal?

(12) **A** To the best of my abilities, yes.

(13) **Q** Though as you said, your entire exhibit is (14) based solely on the distant carriage with none of the (15) local market –

(16) **A** Right.

(17) **Q** – involvement.

(18) **A** By Form 3 systems.

(19) **Q** Right, by Form 3 systems only. Are there (20) another questions?

(21) **ARBITRATOR WERTHEIM:** No.

(22) **BY MR. LANE:**

(23) **Q** Why don't you – just turning to page (24) seven – I think we can go through any of your tables (25) here. Why didn't you provide us with the number of

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(1) subscribers that carried – that were carried by each (2) of these types of systems?

(3) **A** Why didn't I?

(4) **Q** Yes.

(5) **A** Well, I mean, I guess the primary reason (6) is because subscribers, per se, are not relevant here. (7) What's being – what our concern is was with royalties (8) and we might also be interested in how many systems (9) are carrying different kinds of signals.

(10) But the subscribers didn't seem

to be (11) relevant particularly.  
 (12) Also to some degree, I mean, systems that (13) generally – you know, revenues and royalty payments (14) are going to be, on some degree, proportional to (15) subscribers, but not – obviously not perfectly so.

(16) Q But wouldn't subscriber information (17) provide us with an idea of how many people are getting (18) different types of stations?

(19) A Certainly.

(20) Q I'd like to turn to page ten, if you will (21) please. I thin you stated yesterday that there are (22) other superstations, but you didn't count them, (23) besides the four that you've listed here as "other (24) superstations?"

(25) MR. NEIMAN: Objection, Your Honor. I

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(1) think that mischaracterizes his testimony.

(2) ARBITRATOR WERTHEIM: I think he should (3) clarify.

(4) CHAIRPERSON JIGANTI: Overruled.

(5) THE WITNESS: I said that there were other (6) stations that were carried by satellite.

(7) BY MR. LANE:

(8) Q Okay. Well, what is your definition of (9) superstation?"

(10) A My definition tends to conform to industry (11) usage, which is that they are these seven independent (12) signals that are carried by satellite.

(13) Q So is the definition these signals or is (14) the definition that they're carried by satellite?

(15) A For my purposes, a superstation is the (16) signals that we defined here in this list.

(17) Q We understand that. What's the industry (18) definition?

(19) A I believe that conforms to the industry (20) definition.

(21) ARBITRATOR WERTHEIM: This is an informal (22) term "superstation" and it's not defined –

(23) THE WITNESS: It was originally invented (24) by WTBS and it's been –

(25) ARBITRATOR WERTHEIM: For advertising

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(1) purposes?

(2) THE WITNESS: Yes.

(3) ARBITRATOR WERTHEIM: I mean, it's not (4) pursuant to any rule or –

(5) THE WITNESS: No, there's no legal –

(6) BY MR. LANE:

(7) Q Well, that's not quite true, is it?

(8) A Well, I guess now there is, but –

(9) Q There's not – there's not a definition, (10) is there, for cable purposes, but there is a (11) definition in Section 119 of the Copyright Act of (12) "superstation?"

(13) A That may be. But it's not an FCC term, (14) for instance.

(15) Q Okay. Now what is – what is the point of (16) this Chart 5.1 on page ten of your testimony?

(17) A It's to give some evidence about which (18) signals cable operators carry more frequently or less (19) frequently.

(20) Q And you say at the bottom of the page that (21) one of the factors that distinguishes the (22) superstations is that they all carry live sporting (23) events?

(24) A That's correct.

(25) Q And are we to take anything from this

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(1) table about stations that carry live sporting events?

(2) A Well, to the extent to which WTBS, for (3) instance, and WGN both carry a lot of live sporting (4) events and they are also widely carried, we might (5) conclude that the stations with live sporting events (6) have wide carriage since these do.

(7) Q But we have five other superstations that (8) aren't widely carried that carry a lot of live (9) sporting events, right?

(10) A I guess it depends upon your definition of (11) "widely carried" here. These are, after all –

(12) Q They're not widely carried.

(13) A Pardon me?

(14) Q I said they're not widely carried.

(15) A Well, that's sort of a relative (16) comparison.

(17) Q Well, do you think KTLA at 32 is widely (18) carried?

(19) A It probably puts it in the top 25 signals (20) in terms of the number of systems.

(21) Q Is the fact that – what trend can we draw (22) from this?

(23) A From this table overall? As I said (24) yesterday, that the original superstations, and really (25) in particular WTBS and WGN, have shown marked growth

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(1) over the three year period here.

(2) While I believe with only one exception, (3) educational stations, all other forms of carriage have (4) generally declined.

(5) Q And that includes the five other (6) superstations, all of which carry sports?

(7) A Yes, that's true.

(8) Q So that – when you have the all (9) superstation line with the plus eight percent over (10) there in the right-hand column, if we took out TBS and (11) GN, we'd have a negative number, wouldn't we?

(12) A That's true.

(13) Q Now did you look at other stations that (14) carry live sporting events –

(15) A Only for the –

(16) Q – separately?

(17) A Only in the analysis that we showed (18) yesterday about regional carriage patterns.

(19) Q Okay. So you didn't – you didn't break (20) them out anywhere else to determine whether the other (21) flagship stations had a decline in carriage like the (22) five superstations?

(23) A I don't believe so.

(24) Q And how many flagship stations are there, (25) to your knowledge?

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(1) A Our count was that there were 59 that (2) carried a professional sporting event, of which 56 (3) were carried over distant signal.

(4) ARBITRATOR WERTHEIM: Is there a (5) substantial difference between the lives sports (6) programming carried by the original superstation and (7) carried by the other superstations in terms of typical (8) hours of programming or whatever the element may be?

(9) THE WITNESS: As my report says, WTBS and (10) WGN carry more sporting events, more live professional (11) sporting events, than any other distant signal.

(12) ARBITRATOR WERTHEIM: Are you referring to (13) a page that quantifies that compared to the other (14) superstations?

(15) THE WITNESS: It's not in my testimony. (16) I don't know about other parts of the case.

(17) ARBITRATOR WERTHEIM: Well roughly, if you (18) know, are we talking about the originals carrying (19) sports on 75 percent of their program hours whereas (20) the others carry only 25? Or what's the range of the (21) difference, if you have that total?

(22) THE WITNESS: If you could give me a (23) second here.

(24) ARBITRATOR WERTHEIM: Okay.

(25) (Pause.)

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(1) THE WITNESS: Over the three year period?



(24) ~~THE WITNESS~~ So, that's just for one (25) year. The 431 events was over the three-year period.

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- (1) ARBITRATOR WERTHEIM: Oh, I see.
- (2) MR. LANE: So there are roughly –
- (3) THE WITNESS: In 1992, there were 156 (4) events.
- (5) ARBITRATOR WERTHEIM: Where are you (6) getting that information?
- (7) THE WITNESS: From documents that I (8) believe are in another part of the case.
- (9) MR. NEIMAN: Your Honor, these are (10) documents that have been produced in discovery. And (11) as I offered before, we're happy to make them (12) available to you at the break.
- (13) ARBITRATOR WERTHEIM: Well, if you're (14) going to give us numbers, it's helpful to know where (15) the numbers come from.
- (16) MR. NEIMAN: Well, Your Honor – yes, they (17) came up in cross examination.
- (18) ARBITRATOR WERTHEIM: And I don't think (19) any of this here on the Panel yet know what Exhibit 8- (20) X purports to be.
- (21) MR. LANE: Why don't you show –
- (22) ARBITRATOR WERTHEIM: We don't have a copy (23) so it's hard for us –
- (24) MR. LANE: The Chairman asked me to do it (25) this way. I would have tried to get it – I would

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- (1) rather do it the other way, that everybody have a (2) copy, but –
- (3) ARBITRATOR WERTHEIM: I don't mind doing (4) that if you just have your witness identify what it is (5) so we can follow –
- (6) MR. LANE: It's not my witness, I'm sorry. (7) I am trying to do that. He is not my witness.
- (8) ARBITRATOR WERTHEIM: Well, he may be able (9) to identify it.
- (10) MR. LANE: I think he's indicated that he (11) can't. Is that correct?
- (12) THE WITNESS: It –
- (13) BY MR. LANE:
- (14) Q This wasn't prepared by you, was it?
- (15) A No. It purports to be a list of stations (16) with the title "Major Sports Share of Time During (17) Sweep Weeks 1991 on Independent Stations." (18) It has a column of call signs, a column of (19) cities, a column marked "number of quarter hours," and (20) a column marked "percent of time." (21) And then it has individual figures; for (22) instance, WTBS/Atlanta has 602 in the "quarter

hour" (23) column, and I believe it's "6.7" in the "percent of (24) time" column.

(25) Q So what I'm asking him now is from his own

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- (1) calculation study that he earlier gave us, is that (2) percentage consistent with what his calculations would (3) be?
- (4) CHAIRPERSON JIGANTI: Mr. Lane, at this (5) time, we're going to take a ten minute recess.
- (6) MR. LANE: Okay.
- (7) CHAIRPERSON JIGANTI: And I suspect you're (8) going to go see Leah and –
- (9) MR. LANE: All right.
- (10) CHAIRPERSON JIGANTI: – make a xerox.
- (11) MR. LANE: I'll be happy to do that.
- (12) CHAIRPERSON JIGANTI: Okay.
- (13) (Whereupon, the proceedings went off the (14) record at 10:31 a.m. and resumed at 10:45 a.m.)
- (15) CHAIRPERSON JIGANTI: We're marking that (16) Exhibit –
- (17) (Whereupon, the above (18) identified document was marked (19) as Program Suppliers Exhibit (20) No. 8-X for identification.)
- (21) MR. LANE: I think we're marking it. And (22) during the break, I talked with Dr. Lemieux and (23) Counsel, and I think it's fair to say that Exhibit 8-X (24) is a list that was prepared by us.
- (25) It, as the title indicates, is based on

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- (1) independent stations, not all of which are flagship (2) stations.
- (3) There is – all the ones that have zeros, (4) although we have to check exactly – we're assuming (5) the ones with zeros are not flagship stations because (6) those are the ones that don't carry sports.
- (7) There are differences – Dr. Lemieux, when (8) he gave you some numbers earlier, they were three-year (9) numbers. He has numbers on a yearly basis.
- (10) As the title of 8-X indicates, it's only (11) for the sweep weeks which, as I'm sure you do not (12) know, are the – I'll ask Dr. Lemieux, what are the (13) sweep weeks?
- (14) THE WITNESS: When the A.C. Nielsen (15) Company, an Arbitron as well, measure viewing in local (16) television markets, they do it in four different (17) periods each year.
- (18) There are four weeks in essentially (19) February, May, July and November where individual (20) households keep diaries of the television programs (21) they watch.
- (22) MR. LANE: Okay. So there were

some (23) differences in the numbers from – Dr. Lemieux was (24) trying to extrapolate some of his numbers and we were (25) trying to extrapolate our numbers to try to come to a

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- (1) common ground.
- (2) And I think it's fair to say that we were (3) unable to do that during the break. But I think both (4) sides felt if this was information that the Panel (5) thought was useful, we would keep it in for now.
- (6) And Sports, as I understand it, will (7) provide you with some additional information. And to (8) the extent you think it necessary on Exhibit 8-X, one (9) of our witnesses, when he comes up, will be able to (10) discuss this further.
- (11) CHAIRPERSON JIGANTI: So your proposal is (12) now?
- (13) MR. LANE: I think we're keeping it in for (14) whatever weight the Panel thinks that it's valued at (15) this time.
- (16) CHAIRPERSON JIGANTI: Okay.
- (17) MR. NEIMAN: Your Honor, we don't (18) necessarily agree with the numbers here. If they want (19) to present it to you with a witness to come later, (20) that's fine with us.
- (21) CHAIRPERSON JIGANTI: All right. So it (22) will be admitted.
- (23) (Whereupon, Program Supplier (24) Exhibit No. 8-X was received (25) into evidence.)

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- (1) ARBITRATOR WERTHEIM: Just to clarify, (2) there's a number here that I can't read. That must be (3) in the "percent of time" column for WTBS. Is that a (4) "6.7?"
- (5) MR. LANE: I believe it is, sir.
- (6) ARBITRATOR WERTHEIM: So does that mean (7) that during the sweep weeks, something less than seven (8) percent on TBS was devoted to major sports programs?
- (9) MR. LANE: Correct.
- (10) ARBITRATOR WERTHEIM: Is that how you read (11) it, Dr. Lemieux?
- (12) THE WITNESS: That's how I read it, yes.
- (13) CHAIRPERSON JIGANTI: Okay, Mr. Lane, (14) proceed.
- (15) BY MR. LANE:
- (16) Q Now, do you have sufficient information (17) with you, Dr. Lemieux, to tell us on a yearly basis (18) what percentage of time – on the stations that you (19) mention, you have information devoted to sports?
- (20) A I have some of the information, but not – (21) I don't think sufficient information to generate a (22) number which is

(2) ARBITRATOR WERTHEIM: Well, whatever.

(3) THE WITNESS: Well, over the three year (4) period, by my count, WTBS carried 431 live (5) professional sports events. WGN carried 498. (6) I'm afraid I don't have a number for WWOR. (7) WSBK carried 380, and that was the next most (8) substantial number more than WWOR.

(9) MR. NEIMAN: Your Honor, we'd be happy to (10) provide you with the numbers for the other (11) superstations after the break.

(12) MR. LANE: I have here - I don't have (13) sufficient copies, but if there's a copying machine, (14) I could make an exhibit.

(15) We have calculated the amount of time for (16) sports programs on all the superstations for which we (17) had data. I don't know how many there are here, but - (18) -

(19) ARBITRATOR WERTHEIM: Well, I think that (20) would be helpful because you're making a presentation, (21) your and your other witnesses for the Sports (22) Claimants, a very strong point -

(23) MR. LANE: They're not my witnesses, just (24) to make it clear, okay?

(25) ARBITRATOR WERTHEIM: You're making a

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(1) strong point that the longest growth of the (2) superstation is marginally attributable to the sports (3) programming being carried. It substantiates the claim (4) of sports for a bigger share in this proceeding.

(5) If, in fact, the other superstations carry (6) very close to the same amount of sports and their (7) group has declined, that's an important qualification (8) when you've made your point you're trying to make.

(9) Now maybe they haven't declined. I don't (10) know. But I think those things would be helpful.

(11) CHAIRPERSON JIGANTI: Mr. Lane, if you're (12) going to use that in cross examination, I suggest you (13) mark it as an exhibit, use it, enter it, and we can (14) have it reproduced subsequently.

(15) MR. LANE: Okay. At this time, I would (16) like to have one that I do have prepared as Exhibit 7- (17) X, and this is a list which I believe we got from (18) Sports, although we may have retyped it.

(19) And are these, Dr. Lemieux, the 59 to (20) which you earlier referred as "flagships?" Seven - (21) 7-X.

(22) THE WITNESS: Well, I count 56 signals (23) here. So I'm assuming that

these are the ones that (24) are distant signals.

(25) (Whereupon, the above

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(1) identified document was marked (2) as Program Suppliers Exhibit (3) No. 7-X for identification.)

(4) BY MR. LANE:

(5) Q Right. And there are three more that (6) weren't carried as distant signals?

(7) A That's correct.

(8) Q Do you know what those were?

(9) A Not off the top of my head.

(10) ARBITRATOR WERTHEIM: Would somebody tell (11) me why half the stations have call signs that begin (12) with "K" and the others with "W?" What's the (13) difference?

(14) MR. LANE: East or west of the (15) Mississippi. Is that correct?

(16) MR. NEIMAN: That's my understanding. And (17) the "C's" are obviously Canadian.

(18) MR. LANE: Right, except for Pittsburgh (19) with KDKA is the only -

(20) MR. NEIMAN: Right.

(21) BY MR. LANE:

(22) Q Now these are the stations that are (23) somehow - are these in other independents except for (24) the seven that -

(25) A And some of the - numbered affiliates as

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(1) well.

(2) Q At this time, Mr. Chairman, although I (3) only have one copy at the moment, I'd like to mark as (4) Program Supplier Exhibit 8-X a one-page document, I'll (5) show the witness -

(6) MR. NEIMAN: Can I see a copy of that, (7) please?

(8) MR. LANE: I only have one copy.

(9) MR. NEIMAN: Well, can I see it just on (10) the way over?

(11) BY MR. LANE:

(12) Q And you're familiar with the way that the (13) time is calculated from Nielsen data for sports (14) programming compared to all programming on stations, (15) are you not, Dr. Lemieux?

(16) A I'm not sure what the methodology is in (17) this case. Is this meters or divers?

(18) ARBITRATOR WERTHEIM: Well, before you (19) start answering questions, would you identify what the (20) document is for us?

(21) THE WITNESS: I think that would be -

(22) MR. LANE: Okay, I'm sorry. I thought I (23) had. This is a list of -

(24) ARBITRATOR WERTHEIM: Maybe we should have (25) the witness identify

it rather than Counsel, if he

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(1) can.

(2) MR. LANE: It appears - does it appear to (3) be approximately 43 stations of the ones that were (4) listed on Exhibit 7-X?

(5) THE WITNESS: Forty-something, yes.

(6) BY MR. LANE:

(7) Q Would you just compare those to the ones (8) on 7-X and are those all stations on there?

(9) MR. NEIMAN: You want him to compare (10) whether every single one of those is on this other (11) list?

(12) MR. LANE: Yes.

(13) THE WITNESS: Well, I don't see KBHK. (14) Well, the first one is not. This one is.

(15) (Pause.)

(16) THE WITNESS: I don't see KHTV either.

(17) (Pause.)

(18) CHAIRPERSON JIGANTI: Mr. Lane, do you (19) want the witness to -

(20) THE WITNESS: Some of those stations are (21) and some of these stations are not on the list.

(22) CHAIRPERSON JIGANTI: Okay, that's your - (23) Dr. Lemieux's answer. Your next question?

(24) BY MR. LANE:

(25) Q Okay, do you know whether - do you know

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(1) what the definition of "sports programming" for the (2) Nielsen data is?

(3) A Not precisely. I presume it includes (4) professional events. I don't know what it does with (5) other ones.

(6) Q And are the numbers that you see for WTBS (7) - you had a WTBS number of the number of events, did (8) you not, that you earlier testified to?

(9) A Yes.

(10) Q And how many hours does the represent for (11) the entire broadcast year of WTBS?

(12) A The number the's on here or the number (13) that I reported?

(14) Q The number that you reported.

(15) A Well, we don't know. I'm counting events, (16) but just as a guess, probably somewhere in the (17) neighborhood of 300, maybe 400 hours.

(18) Q And what would that translate to for the (19) entire year?

(20) A Well, I'd have to have a calculator for (21) that.

(22) ARBITRATOR WERTHEIM: Excuse me, you said (23) maybe 400 hours for 431 events?

comparable to the numbers here.

(23) Because I have numbers about events, but (24) I don't have all the events for which we're seeking (25) compensation. Nor do I have good estimates for the

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(1) average amount of time per event to be able to (2) generate a time-based number.

(3) Q And the numbers that you earlier read into (4) the record were, just to be clear, three-year numbers, (5) were they not?

(6) A They were -

(7) Q They were summing three years. They (8) weren't just a single year.

(9) A Right, the total number of events over the (10) three-year period.

(11) Q So that in any one year, roughly a third (12) of those events occurred?

(13) A Right.

(14) Q Any one of the three years at issue here?

(15) A Yes.

(16) ARBITRATOR WERTHEIM: Dr. Lemieux, I'm (17) having a little trouble reconciling the percentage of (18) the time for - sports on this exhibit with other (19) testimony we received concerning the dominance of (20) sporting events on these superstations. (21) Six or seven percent, as the largest share (22) of time under WTBS, doesn't seem very large to me.

(23) But do these figures seem in the ballpark (24) from your analysis?

(25) THE WITNESS: I'd be willing say that

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(1) they're in the ballpark.

(2) ARBITRATOR WERTHEIM: So in a typical, (3) say, 12-hour day, seven percent of the time would (4) amount to - how many hours?

(5) THE WITNESS: About one.

(6) CHAIRPERSON JIGANTI: Was that pun (7) intended, "in the ballpark?"

(8) ARBITRATOR WERTHEIM: Okay, thank you.

(9) ARBITRATOR FARMAKIDES: Can I clarify (10) something that just came up? What is the average (11) number of days that a superstation - average number (12) of hours that a superstation is on the air?

(13) THE WITNESS: They're on 24 hours a day.

(14) ARBITRATOR FARMAKIDES: So they're on 24 (15) hours a day.

(16) THE WITNESS: Right.

(17) ARBITRATOR FARMAKIDES: So when we talk (18) about these ratios, we're talking about as compared to (19) 24 hours in a day.

(20) THE WITNESS: For those stations, yes.

(21) ARBITRATOR WERTHEIM: Now these are (22) percentages of a 24-hour day?

(23) THE WITNESS: I would presume it may vary (24) from station to station.

Well actually, I don't know (25) because Nielsen, I don't believe - at least Nielsen

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(1) used to not measure between 2:00 a.m. and 6:00 a.m.

(2) I don't know whether that's the case in (3) these data or not. So it could be that there is a (4) four hour block late at night that's not included here (5) that has to do with the way Nielsen collects data.

(6) But I have no idea whether that's true (7) about these particular numbers. I know that's been (8) true in other periods.

(9) ARBITRATOR WERTHEIM: Well, 2:00 a.m. on (10) the east coast is only 11:00 p.m. on the west coast. (11) And there might be a lot of sporting events still (12) going on at 11:00 p.m.

(13) THE WITNESS: Well, the households in (14) California keeping diaries are keeping their diaries (15) at 11:00 p.m. - So from their point of view, it's still (16) 11:00 p.m.

(17) They didn't use to collect data between (18) 2:00 a.m. and 6:00 a.m. in the local time zone, (19) whatever that turned out to be.

(20) ARBITRATOR WERTHEIM: So if someone in (21) Washington was watching a fight in Las Vegas or a San (22) Francisco ballgame or something that they picked up on (23) cable, and they're watching it at 2:00 in the morning, (24) that wouldn't be counted here?

(25) THE WITNESS: Under what was - I don't

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(1) what the Nielsen practice is that underlies these (2) data, Your Honor, okay? So I - but yes, in earlier (3) periods that I am more aware of what Nielsen's (4) policies were, that's correct.

(5) ARBITRATOR WERTHEIM: Okay.

(6) BY MR. LANE:

(7) Q I'd like you to turn to page 17 of your (8) testimony, footnote 8. And this did - this explains, (9) does it not, how you calculate the 3.75 royalties that (10) you've assigned to different stations?

(11) A Yes, it describes how I allocate the (12) royalty fund, the 3.75 royalties collected to the (13) individual signals.

(14) Q And let me see if I understand

this (15) correctly. If a system carries WTBS, WWOR and WGN, (16) and it has two permitted signals, and so it's carrying (17) one signal that's a 3.75 signal. That's my hypothesis.

(18) And let's say, even though this is not (19) real-world, that the 3.75 royalties in total re \$150.

(20) A Okay.

(21) Q Okay. How did you assign that \$150 a (22) month to those stations for 3.75 purposes?

(23) A I would have given an equal share of \$50 (24) each to each of the three signals.

(25) Q And let's assume that the basic royalties

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(1) in that situation were \$300. How would you have (2) assigned that \$300?

(3) A By the same process. I would have (4) assigned \$100 to each of the three signals.

(5) Q So in effect, each signal is counted, or (6) the royalties related to each signal are counted, for (7) basic purposes and 3.75 purposes?

(8) A For systems that carry a 3.75 signal, yes.

(9) Q Now in the instances of carriage, what do (10) you do in that situation? Do you count all three for (11) basic and all three for 3.75?

(12) A You'll notice we don't report a figure for (13) instances of carriage for 3.75 signals because it's (14) difficult to know what - either we could have (15) assigned a fractional instance and said each of these (16) stations constituted a third of an instance of 3.75 (17) carriage. (18) I chose simply not to - I chose that (19) rather than getting into doing it that way to simply (20) not discuss instances at all in the case of 3.75 (21) signals.

(22) Q But in effect, the way that you've (23) assigned the royalties is giving each station that's (24) carried the same value if there's a 3.75 royalty pay?

(25) A Unless there's a mixture of networks and

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(1) independents. But if we're talking only about (2) independents here, then - and only those signals that (3) could have been - that's more complicated than that.

(4) I mean, I'm only attributing royalties to (5) signals which could have been dropped under the former (6) rules in order to allow them to substitute a new (7) signal.

(8) So for example, if I was a cable operator (9) carrying a signal under the former rules, under say a (10)

waiver or a grandfather clause, or one of those other (11) categories of items that we saw yesterday in the list (12) on places where the FCC rules did not apply for some (13) unique reason on this particular system.

(14) Let's say I have petitioned the FCC for a (15) waiver to carry a signal above and beyond my legal (16) quote, and the FCC granted that. That signal is not (17) a signal to which we then reallocated royalties (18) because it could not have been dropped and replaced by (19) another signal.

(20) Because only that signal has been waived, (21) and the waiver wasn't just generally said, "oh, you (22) can just take anything else and stick it in there." (23) That signal was waived specifically for (24) that signal. And so the exchange that I'm talking (25) about here couldn't have taken place.

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(1) So there are categories of signals in (2) which there is no reallocation done because they're (3) being carried for reasons that are outside of the (4) market quota rules; that is, how many signals you can (5) have by what size market you're in.

(6) Is that reasonably clear?

(7) Q So you allocated the 3.75 royalties among (8) the market quota signals plus the signals - some (9) other signal that would have been outside the market (10) quota, but now subject to any of the other exemptions? (11) A Essentially, the only signals that were (12) subject to the market quota rules are ones that are (13) eligible for reallocation in this model.

(14) Q And did you take the table system's (15) designation of these systems being market quota?

(16) A Yes, I did.

(17) Q Now in this case, I'm looking at page 18, (18) Table 7-1, I'm a little unclear. Why did you only (19) give us 1983 and 1992 and not give us anything in (20) between?

(21) A Because in my 1989 testimony before the (22) tribunal, this allocation didn't take place.

(23) So we don't have in the record comparable (24) figures from a prior year. The only data in the (25) record for which there are comparable figures is the

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(1) 1983 figures from my report for that year.

(2) Q But you could have created

something to go (3) into this record, right, just like you created 92-2 to (4) get -

(5) A Right. Substantively, the other - (6) another point of view is that 1983 was the first year (7) that the 3.75 one was created. And so this gives us (8) some sense about what's happened to the funded self (9) over its entire lifetime.

(10) Q And -

(11) A It's an arduous process to do this (12) allocation because I have to look at each, individual, (13) cable system, look at its compliment of signals and (14) see which ones were permitted or excluded under the (15) former rules, and then make a designation as to which (16) ones have to royalties allocated to them. (17) So we chose not to go through that process (18) for other years.

(19) Q And in your 1990 testimony, the terminated (20) 1990 proceeding, you did present such information, did (21) you not?

(22) A That may be, yes.

(23) Q I'd like to show you a copy of Board's (24) Exhibit 2 from the 1990 Cable Royalty Funds report (25) which you indicated you are the author. In fact, were

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(1) you author of that?

(2) A Yes, I was.

(3) Q And does that, in fact, do the 3.75 (4) allocation?

(5) A I believe it does, yes.

(6) Q So you had already done that previously (7) and introduced it into proceedings that involved cable (8) royalty distribution?

(9) A I guess so.

(10) Q And was there any reason why you didn't (11) just take that and plug it into this testimony here? (12) I mean, you had done all the work, right?

(13) A I guess - I mean, primarily, we were just (14) trying to reduce the number of numbers in this report, (15) which already has too many numbers in it.

(16) MR. NEIMAN: Your Honor, if I can just (17) clarify, it's the 1990 numbers that are in the report (18) that Mr. Lane showed the witness.

(19) CHAIRPERSON JIGANTI: Mr. Lane, do you (20) accept that?

(21) MR. LANE: Yes, absolutely. The 1990 is (22) part of this case, isn't it?

(23) THE WITNESS: I believe so, yes.

(24) BY MR. LANE:

(25) Q So those numbers would have been clearly

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(1) relevant to the issues here, right?

(2) A I'll let you characterize it that way.

(3) Q Now when you look at some of these (4) numbers, like let's look at KTLA -

(5) ARBITRATOR WERTHEIM: Are you referring (6) again to -

(7) MR. LANE: No, Table 7-1 on page 18 of (8) this testimony, sir. KTLA, do you see that?

(9) THE WITNESS: Yes.

(10) BY MR. LANE:

(11) Q Okay. Now you show a 139 percent (12) increase.

(13) A That's correct.

(14) Q Right? Now what are we supposed to take (15) from that number?

(16) A From the 139 percent increase?

(17) Q Yes. Is that an important number on this (18) table to your testimony?

(19) A No, I don't think it's as important as the (20) 81 percent share that goes to the original three (21) superstations or the 84 percent share to all (22) superstations overall.

(23) Q So -

(24) A They're not unimportant figures, but no, (25) I would say that, you know, we're talking - that 1398

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(1) percent is - we're talking about \$50,000 or \$60,000 (2) here or even less.

(3) Q So is that true that the growth column (4) really doesn't tell us a whole lot in these tables?

(5) A Well, I think it tells us a out more about (6) the signals for which there was a larger base in 1983- (7) 2. That is, clearly the fact that KTBT went from (8) \$11,000 to \$176,000, one could argue that that 1,400 (9) percent increase is somewhat less significant because (10) it started from such a small base.

(11) On the other hand, the fact that WTBS went (12) from \$2 million to \$9.5 million, that's a more (13) compelling rate of growth because the underlying base (14) in which we are calculating the percentage change is (15) larger to begin with.

(16) Q Now, but the fact of the matter is that a (17) percentage of the fund, except for WTBS and WGN, all (18) the other superstations went down, did they not?

(19) A WWOR did not.

(20) Q It went from 14.4 in 1983 -

(21) A I'm sorry, are you talking about shares?

(22) Q Yes.

(23) A Yes.

(24) Q Percentage of the fund.

(25) A Yes, in terms of shares, that's true.

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(1) Q So even though they had some sort of a (2) growth rate here, like WWOR had 197 percent growth (3) rate, it still was a smaller portion of the entire (4) 3.75 finding, correct?

(5) A Right, WTBS and WGN grew so fast and so (6) substantially that other stations, even if they (7) showed, like is WWOR's case is essentially nearly a (8) tripling of its royalties, didn't keep pace.

(9) And so its share, its relative share, (10) falls.

(11) Q So one of the things that we have to (12) determine is whether the growth rate kept pace with (13) the growth in the overall fund?

(14) A Right, which is largely being driven by (15) the growth in WTB and WGN.

(16) Q And the other independent, how many – do (17) you know how many independent stations there are that (18) had distant signals for which you counted 3.75 (19) royalties?

(20) A No. I'd have to go back through the data (21) and look for the answer to that.

(22) Q And you don't know how many of those were (23) flagships?

(24) A No.

(25) Q Were they all flagships?

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(1) A The other independent stations?

(2) Q Yes.

(3) A No, I'm sure that's not the case.

(4) Q But some portion of them were flagship (5) stations?

(6) A The other independents?

(7) Q Yes.

(8) A Yes.

(9) Q I'd like you to turn to page 20 of your (10) testimony. And this is where you talk about the (11) effects of reinstitution of the syndicated (12) exclusivity, right?

(13) A Yes.

(14) Q And what are those effects, just that (15) programs or blacked out or –

(16) A And the syndicated exclusivity fund has (17) been moved from the royalty pool essentially.

(18) Q And what do the charges that show up on (19) page 22 and following, what do they have to do with (20) this case?

(21) A What do they have to do with the case?

(22) Q Yes.

(23) A My understanding is that the

substitute (24) programming in not compensable. So as a result, this (25) is an indication of the fraction of the program

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(1) schedules on these two representative days here for (2) which programming was deleted from the distant (3) signals' version of WGN and WWOR.

(4) And in its place was substitute (5) programming that's not compensable under the current (6) proceedings.

(7) Q Now the chart that you showed on page 21 – (8) –

(9) A Yes.

(10) CHAIRPERSON JIGANTI: Excuse me. Could (11) you go back to that?

The purpose was to show that (12) these programs were not compensable?

(13) THE WITNESS: That programming was deleted (14) from these signals as a result of the syndicated (15) exclusivity rule and replaced with programming which, (16) to my knowledge, is not compensable under the rules.

(17) CHAIRPERSON JIGANTI: And the significance (18) of that is?

(19) THE WITNESS: It removes a step – a (20) reasonable portion of the broadcast day of these (21) stations from the body of programming for which (22) syndicators can receive compensation.

(23) CHAIRPERSON JIGANTI: Okay, thank you.

(24) BY MR. LANE:

(25) Q And if you would turn to page 21, please,

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(1) and the charge on that page. Where did you get this (2) from?

(3) A This came from the 1990 MPAA Nielsen (4) Report that listed which quarter hours were subject to (5) syndicated deletions.

(6) Q Now from the Nielsen study in that case, (7) they had already been deleted, correct, from any (8) consideration?

(9) A In the numbers that are reported in your (10) Nielsen study?

(11) Q Yes.

(12) A That's my understanding, yes.

(13) Q So whatever Nielsen studies we have (14) reported have already deleted these programs that (15) you've identified on page 21 in the "deleted" column, (16) correct?

(17) A I believe so.

(18) Q And that's why you listed them here as (19) being the amount of deletions, right?

(20) A Because they were in the Nielsen report, (21) yes.

(22) Q Right. And I take it you accepted these (23) numbers as the percentages that should be presented (24) here as the amount of deletions on these stations?

(25) A As I say in the report, I couldn't

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(1) independently verify these, this information. I'm (2) simply reporting the summary results from the (3) materials that the MPAA provided.

(4) Q Now I'd like to turn back to page 20 at (5) the bottom of the page. Do you see that you indicated (6) that the charge that you provided – it's a negative. (7) "In none of these four instances are the levels of (8) deletions unrepresentative of other Sundays and (9) Wednesdays in November of 1990." Do you see that?

(10) A Yes.

(11) Q And what check did you do for that?

(12) A I examined the similar data here from both (13) the MPAA study and the Boston Globe TV Week for those (14) other weeks.

(15) Q Now I'd like to show you a copy of an (16) exhibit that was introduced into evidence yesterday. (17) It's Exhibit 6-X. It's the NBA Broadcast Manual.

(18) And I'd like you turn, if you will, to the (19) page for Wednesday WGN in November that you – the (20) Wednesday. And that's page 23, is it not?

(21) A Yes.

(22) Q And you selected Wednesday, November 14th, (23) did you not?

(24) A Yes, I did.

(25) Q Now this list – you were here yesterday

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(1) when Mr. Stern testified –

(2) A I was.

(3) Q – and he indicated this was the complete (4) schedule of the NBA games for the 1990/91 season. Do (5) you recall that?

(6) A He indicated that it was – what it was as (7) of July, but it was subject to later revision.

(8) Q For the NBC games of the week that were (9) changed, correct?

(10) A I believe. Well, I think there were also (11) questions about TNT or other outlets.

(12) Q Well, this –

(13) A Okay, whatever.

(14) Q – exhibit is dated in September of 1990, (15) is it not?

(16) A Yes.

(17) Q Yes.

(18) ARBITRATOR WERTHEIM: And this is 6-X?

(19) MR. LANE: 6-X, sir. And I'm turning to (20) the first page that we discussed yesterday which, as (21) you recall, has the date 9/17/90 in the top, right- (22) hand corner. And I would just like you to look at (23) Wednesday, November 7, 1990, and tell me if there was (24) a game on WGN on that night of the Bulls.

(25) THE WITNESS: Wednesday, November seventh?

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(1) BY MR. LANE:

(2) Q Yes.

(3) A Yes, there was.

(4) Q Okay. And if we turn the page to the next (5) page, and then we see Wednesday, November 14th, which (6) is the same date you picked on -

(7) A Right.

(8) Q - page 23 of your testimony, is it not? (9) Was there a Bulls game on that day?

(10) A No.

(11) Q And then we turn to the next Wednesday in (12) November, the 21st. Was there a Bulls game that was (13) broadcast by WGN on that Wednesday?

(14) A There appears to be so, yes.

(15) Q And then if we turn to the final Wednesday (16) in November of 1990, was there a Bulls game broadcast (17) on WGN on that Wednesday?

(18) A There appears to be so, yes.

(19) Q So three out of the four Wednesdays in (20) November of 1990, there was a Bulls game during the (21) period that you've identified as being a lot of black- (22) outs on November 14th, right?

(23) A It would be about a two hour block of (24) these, yes.

(25) Q Right. And that would occur roughly at

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(1) the same time as our favorite movie for this year, (2) Biloxi Blues, right?

(3) A Yes.

(4) Q So if you had picked another Wednesday in (5) November of 1990, that time period would have been not (6) blacked out because a Bulls game would be on, correct?

(7) A For a Wednesday, yes.

(8) Q Right. And you said this was (9) representative of all Wednesdays, did you not, on page (10) one?

(11) A I believe so, yes.

(12) Q Yes, right there at the bottom of the (13) page.

(14) A Well, what I say here is that the levels (15) of deletions are not under-representative.

(16) Q And if you took those out, that would (17) certainly reduce the levels of deletion, would it not?

(18) A Perhaps, but there be another program that (19) was deleted some - what I meant by that was in terms (20) of the number of hours of deletions - the percentage (21) of the day that was deleted.

(22) This particular day wasn't (23) unrepresentative, but the -

(24) Q Of the other Wednesdays in November of (25) 1990. Isn't that what you said in -

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(1) A Yes.

(2) Q - black on white on page 20 of your (3) testimony.

(4) A Yes. I said the levels of deletion. I (5) didn't say specific programs.

(6) Q But the levels change by the number of (7) hours that are deleted in any one day, don't they?

(8) A Yes.

(9) Q Now -

(10) ARBITRATOR WERTHEIM: I'm not 100 percent (11) sure I'm following this. Dr. Lemieux, looking at (12) Table 8-23 in your exhibit -

(13) THE WITNESS: Yes.

(14) ARBITRATOR WERTHEIM: - we have beginning (15) at 8:00 the movie Biloxi Blues showing locally in (16) Chicago. But elsewhere, WGN is showing a movie. Is (17) that right?

(18) THE WITNESS: Yes. The satellite feed (19) carried a movie called The Bachelor's Daughter.

(20) ARBITRATOR WERTHEIM: And what we're (21) showing is - and what we've just learned from the (22) recent response is that on most Wednesdays in the (23) month of November, instead of getting a substituted (24) movie, what is listed as getting the distant signals, (25) what were getting was the Chicago Bulls game.

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(1) THE WITNESS: That's correct.

(2) ARBITRATOR WERTHEIM: Okay.

(3) BY MR. LANE:

(4) Q Now even with the level of deletion that (5) you've shown here, it's also true, is it not, that (6) WGN's carriage royalties every way you've measured it (7) in this study, increased over this period?

(8) A Yes, it did.

(9) Q And it's also true for WWOR that in many (10) cases, there was a decline in the amount of royalties (11) by the way you measured, was there not, at least in (12) the share of the royalties compared to earlier shares?

(13) A Yes, it shows a small decline.

(14) Q And so the availability of sports on WWOR (15) didn't make - somehow increase the amount of (16) royalties or the amount of carriage of that station in (17) these years, did it?

(18) A I'm not sure I can make a linkage between (19) those.

(20) Q You can't make a linkage between the (21) availability of sports of whether the royalties go up (22) or down from year to year?

(23) A I'd have to see. I mean, I don't know (24) whether sports went up or down on WWOR over the three (25) years either. I'd have to go and look.

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(1) Q But you indicated in your testimony that (2) one of the characteristics of the seven superstations (3) was the availability of live sports events.

(4) A Yes, right.

(5) Q But you're not linking that to the change (6) in the amount of royalties that you show in these (7) tables?

(8) A I thought you were asking me a question (9) that talked about the relationship between changes in (10) the amount of sports carried and changes in royalties. (11) Are you asking me just about -

(12) Q I'm asking you about your testimony. I (13) thought it was about the availability of sports (14) programming on these seven stations that made them so (15) heavily carried. (16) I thought that was the point you were (17) trying to make.

(18) A I believe that, yes, the carriage of (19) sports on these programs - on these stations is one (20) of the factors that makes them heavily carried, yes.

(21) Q Okay. What are some of the other factors?

(22) A For the original superstations or -

(23) Q For all seven of them.

(24) A Well, certainly the fact that they're on (25) satellite makes them move convenient to carry.

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(1) Q And that's it, those two things?

(2) A Those are at least two things.

(3) Q I'm just basing it on your testimony and (4) not anybody else's. What do you think? That's all (5) I'm asking.

(6) A I believe that both of those factors are (7) at least two things that contribute to their carriage.

(8) Q Okay. And we've seen that on various of (9) these charts that a number of the superstations have (10) a decline, not a growth, in the period studied, right?



(11) For example, I'm looking at page 13, Table (12) 6-1.

(13) **A Yes. All but -**

(14) Q All but WTBS and WGN, correct?

(15) **A And WWOR show - I mean, all three of them (16) show an increase in the actual amount of royalties (17) paid.**

(18) Q But a decline in the share.

(19) **A In the share.**

(20) Q We just talked about the growth rate, and (21) you've indicated that that's not really - we're not - (22) - that may not be a good number because if we look at (23) the bottom of Table 6-1, we see the total 6.6 growth (24) rate, right?

(25) **A I believe it's 16.6.**

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(1) Q I'm sorry, 16. You're exactly right. And (2) that's kind of a benchmark. We'd have to say if (3) something had grown more than 16.6 before we could say (4) it really -

(5) **A Before you would see an increase in its (6) share in the revenue pool.**

(7) Q Right, right. So WWOR only grew 7.4 (8) percent, right? So that's less than 16.6 at the (9) funds. So it wasn't growing as fast as the fund (10) overall, right?

(11) **A That's correct.**

(12) Q And the other superstations all have (13) negative growth rates, correct?

(14) **A Yes.**

(15) Q And they have negative numbers, and WWOR (16) has negative numbers for the difference in the (17) percentage of the share, right?

(18) **A Yes.**

(19) Q And so when we look at this, we see only (20) two stations that have growth rates from either (21) perspective and that also have sports programs and (22) that are also carried on satellite, and we see five (23) that went down.

(24) And they all have the same (25) characteristics, correct?

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(1) **A Yes. Well, they have the same (2) characteristics that they carry professional sports (3) programs. I can't characterize their other features.**

(4) Q Okay. And they're carried on a satellite?

(5) **A Yes.**

(6) Q And those are the two features that you (7) have highlighted as the reason you have separately (8) identified these seven stations, correct?

(9) **A That's correct.**

(10) Q You didn't look at any other

features of (11) them, did you, these stations?

(12) **A Not too close, no. Well, except for the (13) syndicated deletions.**

(14) Q Now I just want to turn to page 28 of your (15) testimony. What is the purpose of Table 9.2 and the (16) testimony related to it? And I guess Table 9.1 I'd (17) have the same question.

(18) What are you trying to show us on these (19) two pages?

(20) **A That with the exception, especially of the (21) original superstations, most flagship stations are not (22) carried great distances away from where they're being (23) - where the local broadcasts take place.**

(24) Q Okay. Now in this case, you didn't look (25) at all independents. You just looked at flagship

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(1) stations, right? So you had to break that out, (2) correct?

(3) **A That's correct.**

(4) Q And you had to somehow divide the carriage (5) by all these states that you've listed on page 27 and (6) divide it up into different regions and then figure (7) out if it was next to the region or not next to the (8) region?

(9) **A Yes.**

(10) Q Why did you do that for the flagships (11) here, but you didn't divide the other flagships when (12) you were counting royalties?

(13) **A Because we were concerned about carriage (14) patterns of flagships in this particular case.**

(15) Q But you weren't concerned about the (16) royalties of flagships in the other case? Are you (17) willing to lump together the 52 other flagships that (18) you didn't count in the seven - without the seven (19) superstations, just with all other independents and (20) network affiliates and wherever they fit; just say (21) they're just like them?

(22) **A I'm not -**

(23) Q You don't see any distinguishing (24) characteristics though for royalty calculation of (25) distribution in all these charts, and the wonderful

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(1) graphs that you put together, did you?

(2) **A If we had - I don't know what the case is (3) for flagships that are outside of the satellite (4) delivered ones. It's certainly possible that they (5) have more extensive carriage or whatever, but I just (6) don't know.**

(7) Q So the point of these charts on pages 27 (8) and 28 is that most of the

carriage of flagship (9) stations, other than I guess WTBS is pretty localized (10) or regionalized. Is that fair to say? (11) **A Yes, I'd say that's fair to say. WTBS is (12) certainly the one that's most likely to be carried (13) great distances away from Atlanta.**

(14) Q Just one final set of questions here. How (15) many instances of carriage were we talking about with (16) the other flagship stations?

(17) I mean, how do we know what that average (18) means, 96 percent? It's - there are 7,377 instances (19) of carriage I think you said someplace. It's like 100 (20) instances of carriage or how many - how many are the (21) other flagships representing?

(22) **A How many instances of carriage?**

(23) Q Yes. How big - how big - we know how (24) big WTBS or GN and other superstations are compared to (25) the universe. But then when you look at other

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(1) flagships, we see this after of 96 percent in the same (2) region.

(3) Are we talking about two instances of (4) carriage, 50, 100?

(5) **A We've got -**

(6) Q Do you have any idea?

(7) **A I'm trying to - we've got 40 - in 1992, (8) we have 52 stations, according to page 27. So there (9) are essentially 45 other flagships here.**

(10) You know, some of them could have 30 or 40 (11) instances and some of them could have ten or 20.

(12) **There are probably hundreds of instances of carriage (13) there.**

(14) Q But you don't have an idea of the (15) magnitude?

(16) **A I don't know the exact number, no.**

(17) Q Now, I'm a little bit confused just on (18) something. I thought I had this correct. I had given (19) you an exhibit earlier, 7X, which I thought listed 56 (20) flagship stations and now you are telling me there are (21) only 52?

(22) At one point you said there were 59 (23) flagship stations in your testimony, did you not?

(24) **A Yes, I believe, now that you have pointed (25) it out again, when I reread the report, I believe the**

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(1) **number 52 on page 27 is in error and it should be 59.**

(2) CHAIRPERSON JIGANTI: That would be 52 (3) plus the super stations.

(4) THE WITNESS: Yeah, that may be how I got (5) to that number, yes, that I left those out by (6) accident.

(7) But, yes, on page 27, the number 52 should (8) be 59. I remember rereading the report myself and (9) thinking that can't be correct.  
 (10) MR. LANE: All right. And in that same (11) sentence, you mean that 52 stations originated live (12) telecasts of professional baseball, basketball or (13) hockey games. Not that they carried all three sports?  
 (14) THE WITNESS: Certainly. Yes. Or.  
 (15) MR. LANE: Right. Those are all the (16) questions I have Mr. Chairman.  
 (17) CHAIRPERSON JIGANTI: You said "for"?  
 (18) THE WITNESS: Or. He asked me if the (19) implication here was that those stations all carried (20) all three sports and the answer is clearly no.  
 (21) CHAIRPERSON JIGANTI: And we're talking (22) about, are we not, the top of page 27?  
 (23) THE WITNESS: Yes, the second sentence in (24) the first paragraph on page 27.  
 (25) CHAIRPERSON JIGANTI: Right.

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(1) THE WITNESS: It reads, "In all," it (2) should be, "59 stations originated live telecasts of (3) professional baseball, basketball or hockey games."  
 (4) CHAIRPERSON JIGANTI: Fifty-nine including (5) the seven super stations?  
 (6) THE WITNESS: Yes. Right. I see where (7) the 52 came from.  
 (8) CHAIRPERSON JIGANTI: Mr. Stewart, you (9) were going to examine?  
 (10) Are you okay Dr. Lemieux?  
 (11) THE WITNESS: Yeah, I'm fine. Just keep (12) going. If I could just have a glass of water?  
 (13) CROSS EXAMINATION (14) BY JOHN STEWART  
 (15) MR. STEWART: Good morning, Dr. Lemieux. (16) I'm John Stewart and I am representing the National (17) Association of Broadcasters here. The NAB is claiming (18) royalties for programs produced by stations and (19) broadcast only on those stations which are (20) retransmitted on a distant signal.  
 (21) First, just a point of clarification.  
 (22) CHAIRPERSON JIGANTI: Excuse me. Your (23) colleague is?  
 (24) MR. STEWART: I'm sorry. This is (25) Jacqueline Hands, my colleague from Crowell & Moring,

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(1) also representing NAB.  
 (2) MS. HAND: Jacqueline?  
 (3) MS. HAND: Hand. H-a-n-d.  
 (4) CHAIRPERSON JIGANTI: Okay.

Very good. (5) Thank you.

(6) MR. STEWART: A point of clarification (7) from yesterday's testimony. You talked about a cable (8) operator who operated a cable system that would have (9) a contract to carry WGN. Do you recall that?  
 (10) THE WITNESS: Yes.  
 (11) MR. STEWART: The contract you were (12) talking about was a contract with, for example, a (13) satellite retransmitter for the service of delivering (14) WGN.  
 (15) THE WITNESS: That's correct.  
 (16) MR. STEWART: Because, under the (17) compulsory license means that cable operators don't (18) need contracts with the stations themselves to (19) retransmit.  
 (20) THE WITNESS: In fact, they don't sign (21) them at all, as far as I know.  
 (22) MR. STEWART: Right.  
 (23) ARBITRATOR WERTHEIM: So the contract (24) would be with the satellite operator?  
 (25) THE WITNESS: What is called a satellite

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(1) common carrier or some other resale common carrier. (2) It could be microwave.  
 (3) ARBITRATOR WERTHEIM: So, it would be with (4) that carrier not with WGN.  
 (5) THE WITNESS: Right. If I want to carry (6) WGN, I make a contract with and organization called (7) Untied Video which is the company that puts WGN on the (8) satellite.  
 (9) MR. STEWART: And that agreement would (10) just be for transporting the signal, essentially from (11) where it is picked up near Chicago to the cable (12) operator.  
 (13) THE WITNESS: That's right.  
 (14) MR. STEWART: And other common carriers (15) might, for example, operate microwave links where they (16) would provide the same kind of service of delivering (17) a signal, correct?  
 (18) THE WITNESS: Yes.  
 (19) MR. STEWART: And in that case, the cable (20) operator would have no contract with WGN?  
 (21) THE WITNESS: That's correct.  
 (22) MR. STEWART: Further, there are (23) situations in which a cable operator, let's say in (24) West Virginia, could build his own antenna on top of (25) a mountain and pick up distant signals from Pittsburgh

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(1) and bring them in.  
 (2) In that case, there wouldn't be any middle (3) man and there wouldn't be

any contract with the (4) station?

(5) THE WITNESS: That's right. Yes.  
 (6) The fundamental issue here is that the (7) stations themselves are fundamentally passive in this (8) arrangement.  
 (9) MR. STEWART: Thank you.  
 (10) Next, would you turn please to page 22 of (11) your testimony?  
 (12) Now, on these four pages beginning with (13) 22, you have sample program schedules for selected (14) days for two of the super stations, correct?  
 (15) THE WITNESS: Yes.  
 (16) MR. STEWART: Looking just at the first (17) one for Sunday, November 11 on WGN, do you see at (18) 10:00 p.m. in the left hand column, there is a listing (19) for news?  
 (20) THE WITNESS: Yes.  
 (21) MR. STEWART: And that program is not (22) substituted, correct?  
 (23) THE WITNESS: No, it's not.  
 (24) MR. STEWART: Do you know whether that is (25) a station-produced news program that appears on WGN

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(1) only?  
 (2) THE WITNESS: When you mean that it (3) appears on WGN only, it also appears in the satellite (4) distribution of WGN.  
 (5) MR. STEWART: Oh, let's be clear about (6) that. It doesn't appear on any other broadcast (7) station in the country. It's WGN's own news program.  
 (8) THE WITNESS: If that's what it is, yes. (9) I don't know whether that is specifically WGN's local (10) newscast.  
 (11) But if it were, then yes, it would not (12) appear anywhere else.  
 (13) MR. STEWART: All right. And that, in (14) fact, is the definition of our claim in this (15) proceeding are programs produced by the station and (16) not appearing on other stations.  
 (17) Are you familiar with, looking at 8:00, (18) 8:30 and 9:00 a.m., are you familiar with those (19) programs?  
 (20) THE WITNESS: Only to the extent that I (21) read the program schedule. I haven't actually seen (22) any of them in my own experience to know.  
 (23) MR. STEWART: All right. But those (24) programs are also not substituted for?  
 (25) THE WITNESS: No, they're not.

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(1) MR. STEWART: Those programs -  
 (2) CHAIRPERSON JIGANTI: You are referring to (3) what, now, 8:00, 8:30 and 9:00?  
 (4) MR. STEWART: A.M.  
 (5) CHAIRPERSON JIGANTI: Oh,



a.m.

(6) MR. STEWART: Yes.

(7) CHAIRPERSON JIGANTI: Oh, I'm sorry.

(8) MR. STEWART: So, those programs if they (9) are not substituted for, they are among the programs (10) that are delivered to cable operators when they carry (11) WGN as a distant signal.

(12) THE WITNESS: Yes. Distant signal viewers (13) of WGN could watch those programs.

(14) ARBITRATOR WERTHEIM: That would be true (15) of all the programs where you don't have a (16) substitution show.

(17) THE WITNESS: That's right.

(18) MR. STEWART: And, just looking at these (19) programs here, do you see other syndicated programs (20) and movies that were not deleted?

(21) THE WITNESS: Yes.

(22) MR. STEWART: Do you see any - I guess we (23) don't see any devotional series on that page. But in (24) general, stations might also have devotional series (25) represented by another one of the claimants here that

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(1) would get delivered as part of the package of (2) programs?

(3) THE WITNESS: Yes.

(4) MR. STEWART: And, of course, sports on (5) another Wednesday in November, 1990, there would have (6) been a Bulls game that would have been delivered as (7) part of the package?

(8) THE WITNESS: Yes.

(9) MR. STEWART: And all those programs (10) together are what the cable operator receives when it (11) carries WGN as a distant signal, correct?

(12) THE WITNESS: Correct.

(13) ARBITRATOR WERTHEIM: Is your point here (14) that we cannot tell from this table which of the local (15) programs were in fact locally produced and which were (16) not?

(17) MR. STEWART: Your Honor, we will be (18) putting in direct evidence on WGN and WWOR.

(19) ARBITRATOR WERTHEIM: With respect to what (20) you are asking this witness, is that your principle (21) point you want to elicit?

(22) MR. STEWART: The point that I am seeking (23) to elicit, thanks for asking me to explain it, is (24) simply that the super station signal comprises (25) programs from all of the commercial categories

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(1) represented here. So, when it gets

picked up as a (2) distant signal, it's a package of programs claimed by (3) us, claimed by sports, claimed by devotional and (4) claimed by MPAA.

(5) If you would turn over to page 24, looking (6) at the WWOR schedule, are you familiar with the 10:00 (7) a.m. program there called Steam Pipe Alley?

(8) THE WITNESS: Again, only to the extent (9) that I know its title. I have no knowledge about its (10) content.

(11) MR. STEWART: All right. And turning over (12) to the next page, are you familiar with the program (13) listed there at 10:00 a.m. called Nine Broadcast (14) Plaza?

(15) THE WITNESS: I have the same answer. My (16) understanding is it was broadcast, but I don't know (17) its content.

(18) MR. STEWART: And as you have indicated on (19) these pages, none of those programs I've named were (20) substituted, correct?

(21) THE WITNESS: That's correct.

(22) MR. STEWART: Are you familiar, based on (23) your background in the broadcast industry with a (24) network affiliates programming schedule, generally?

(25) THE WITNESS: Certainly I watch network

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(1) affiliated stations and I know something about them, (2) yes.

(3) MR. STEWART: These two stations that you (4) have laid out programming schedules for here are (5) independent stations, correct?

(6) THE WITNESS: That's correct.

(7) MR. STEWART: If a station were affiliated (8) with, for example, WABC in New York, affiliated with (9) ABC, it's true, is it not, that there would be a block (10) of programs during the daytime and in prime time and (11) an evening news program that would have been supplied (12) by the network, by ABC itself?

(13) THE WITNESS: That's correct.

(14) MR. STEWART: And those programs are not (15) compensated in this proceeding?

(16) THE WITNESS: That's correct.

(17) MR. STEWART: But in addition, on a (18) typical network affiliate's program schedule, there (19) would be programs produced by the station, possibly (20) syndicated programs, possibly devotional programs, (21) possibly sports programs -

(22) THE WITNESS: Yes.

(23) MR. STEWART: - in the non-network time, (24) correct?

(25) THE WITNESS: Yes.

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(1) MR. STEWART: So, when a network affiliate (2) gets carried by a cable operator as a distant signal, (3) there is a similar package of programs once you take (4) out the network programs. Programs owned by different (5) claimants in this

proceeding which the cable operator (6) picks up and resells to its subscribers?

(7) THE WITNESS: Yes.

(8) MR. STEWART: All right, would you now (9) please turn to page 28 of your testimony? This is the (10) table at the top here that Mr. Lane discussed with (11) you.

(12) I believe you noted that WTBS was more (13) distributed nationwide than the other super stations (14) that you listed here, correct?

(15) THE WITNESS: Yes. I see what the (16) evidence here suggests.

(17) MR. STEWART: If you look at the (18) subscriber column in the middle and add together the (19) same region and adjacent regions numbers, for TBS you (20) get something like 51 per cent of subscribers within (21) that same or adjacent region area, correct?

(22) THE WITNESS: Right.

(23) MR. STEWART: If you add the numbers (24) together for the other super stations, WGN and WOR, (25) both coincidentally have 88 per cent of their

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(1) subscribers as all the people that receive them as (2) distant signals within the same region or adjacent (3) region, is that right?

(4) THE WITNESS: Yes.

(5) MR. STEWART: The numbers are roughly the (6) same or even higher for the other super stations (7) listed below, is that correct?

(8) THE WITNESS: That's correct.

(9) MR. STEWART: So, for KTVT which is from (10) what market?

(11) THE WITNESS: Dallas-Fort Worth.

(12) MR. STEWART: A 100 per cent of its (13) subscribers, distant subscribers are within the same (14) region.

(15) THE WITNESS: Yes.

(16) MR. STEWART: I would like to show you, (17) Dr. Lemieux, a printout, a bound printout and ask you (18) to take a look at it and tell me if you can identify (19) what it is?

(20) ARBITRATOR WERTHEIM: Are you going to (21) have this marked for identification?

(22) MR. STEWART: I am going to mark and (23) distribute a page from this document. But I wanted to (24) give Dr. Lemieux and his Counsel the entire document (25) so that he could confirm the source and what it is.

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- (1) THE WITNESS: It appears to be a  
 (2) compilation of reports from the  
 Cable Data (3) Corporation.  
 (4) MR. STEWART: Now, the Cable  
 Data (5) Corporation you've referred to  
 already in your (6) testimony, correct?  
 (7) THE WITNESS: Yes.  
 (8) MR. STEWART: and that's the  
 company that (9) compiles the data, the  
 statement of account data that (10) is  
 filed with the copyright office and  
 makes it (11) available to all the parties  
 here for use in this (12) proceeding?  
 (13) THE WITNESS: Yes.  
 (14) MR. STEWART: It was data from  
 Cable Data (15) Corporation that you  
 used in preparing most of the (16)  
 tables in the testimony that you  
 presented?  
 (17) THE WITNESS: Yes, all the ones  
 that have (18) to do with carriage  
 patterns.  
 (19) MR. STEWART: Now, I would like  
 to ask you (20) to turn to the page I have  
 tabbed there.  
 (21) I would like this document marked  
 as NAB (22) 1990-92, exhibit 1-X.  
 (23) (Whereupon, the above-referred  
 (24) to document was marked as NAB  
 (25) 1-X for identification.)

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- (1) Would you confirm, Dr. Lemieux,  
 that this (2) document, 1-X, is a copy of  
 a page from that printout (3) that I have  
 shown you?  
 (4) THE WITNESS: It appears to be  
 identical.  
 (5) MR. STEWART: Okay. Now, let's  
 go through (6) just for a few minutes  
 and identify the different (7) parts of this  
 printout.  
 (8) First of all, in the upper left hand (9)  
 corner there is a date, do you see that?  
 (10) THE WITNESS: Yes. The August  
 15 date you (11) mean?  
 (12) MR. STEWART: Yes. And you can  
 use the (13) exhibit; I think it is easier.  
 (14) THE WITNESS: Okay.  
 (15) MR. STEWART: Do you know  
 whether Cable (16) Data Corporation  
 typically identifies the date as of (17)  
 which the printout is made in that  
 fashion?  
 (18) THE WITNESS: Yes. That's  
 presumably the (19) date that this  
 particular report was created.  
 (20) MR. STEWART: Now, Cable Data  
 Corporation (21) will update it's data as  
 amended statements of account (22)  
 are filed, or the like, is that correct?  
 (23) THE WITNESS: Yes.  
 (24) MR. STEWART: So, there might be  
 slight (25) differences, depending on  
 which date the printout was

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- (1) prepared?  
 (2) THE WITNESS: Yes. It could  
 differ from (3) the numbers in my report  
 as a result of that as well.  
 (4) MR. STEWART: But this data here  
 is the (5) data that all the parties here  
 rely on?  
 (6) THE WITNESS: Yes.  
 (7) MR. STEWART: Now, it says 'Next  
 period (8) 92-2'. Would you explain  
 what that is?  
 (9) THE WITNESS: That's the second  
 half of (10) 1992; the second  
 accounting period.  
 (11) MR. STEWART: And that's the  
 period that (12) you have used for a  
 number of your analyses, is that (13)  
 correct?  
 (14) THE WITNESS: Yes.  
 (15) MR. STEWART: Then the next,  
 under that (16) August 15 date is a  
 code, SSF3Call, do you know what (17)  
 that stands for?  
 (18) THE WITNESS: I'm not sure I  
 know what the (19) SS means. The F3 I  
 believe refers to form 3 systems (20)  
 and call means that includes call signs.  
 (21) MR. STEWART: In fact, if you read  
 to the (22) right of that, what the title of  
 the printout is, (23) would you do that?  
 (24) THE WITNESS: It is Form  
 3-Carriage of (25) Signals, apparently,  
 ranked by the number of full-time

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- (1) distant subscribers.  
 (2) MR. STEWART: Okay. And below  
 that are a (3) number of columns of  
 data.  
 (4) First, the 'Call Sign' identifies the  
 (5) particular station, is that correct?  
 (6) THE WITNESS: Yes.  
 (7) MR. STEWART: The second is the  
 'Channel (8) Number' on which the  
 station broadcasts over the air (9) in its  
 local market, is that correct?  
 (10) THE WITNESS: Yes. WTBS is  
 channel 17 in (11) Atlanta.  
 (12) MR. STEWART: In Atlanta, right.  
 (13) Now, the next column is labeled  
 'Type'. (14) Can you tell us what that is?  
 (15) THE WITNESS: The 'I' stations are  
 (16) independents, the 'E' stations are  
 non-commercial (17) educational  
 stations, and the 'N' stations are (18)  
 network-affiliated stations.  
 (19) MR. STEWART: The next two  
 columns are (20) community and state.  
 What community and state are (21)  
 they?  
 (22) THE WITNESS: That's the location  
 of the (23) television station itself.  
 (24) MR. STEWART: Now, there are  
 four (25) bracketed sets of columns  
 labeled, 'Total', 'All

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- (1) Distant', 'Full Time Distant', and

'Local'.

- (2) Can you explain what those are?  
 (3) THE WITNESS: As we had talked  
 about (4) earlier this morning, all of the  
 stations that we talk (5) about here as  
 distant signals are also local to some  
 (6) other broadcast market.  
 (7) So, if we take the WTBS case, for  
 (8) instance, if we look under the  
 number of cable (9) systems, this report  
 indicates that there were 2,118 (10)  
 cable systems that carried WTBS at all.  
 (11) If you go to the 'All Distant'  
 column, we (12) find that 2,090 of those  
 systems carried it on a (13) distant  
 signal basis.  
 (14) And if you go all the way to the  
 right (15) hand side, in the 'Local'  
 column, we find that there (16) were 34  
 cable systems that were local to WTBS  
 and (17) carried it on a local basis.  
 (18) These are all presumably  
 somewhere in the (19) Atlanta market.  
 (20) MR. STEWART: So, this is what  
 you were (21) discussing earlier?  
 (22) THE WITNESS: Right.  
 (23) MR. STEWART: That is, that WTBS  
 is not a (24) distant signal when it is  
 carried by cable in its (25) local market,  
 but is a distant signal elsewhere?

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- (1) THE WITNESS: Right.  
 (2) ARBITRATOR WERTHEIM: What  
 is the (3) difference between all distant  
 and full time distant?  
 (4) THE WITNESS: You'll see that the  
 numbers (5) here are identical. This is  
 an artifact I believe, (6) from an earlier  
 period of time in the rules where, (7)  
 before the change in the signal carriage  
 rules, cable (8) systems were allowed to  
 bring in distant signals on a (9) part time  
 basis, particularly late night between,  
 like (10) 11:00 p.m. and 6:00 a.m.  
 (11) They were allowed, for instance, if  
 one of (12) their local broadcast  
 stations went off the air, they (13) were  
 allowed to bring in some other station  
 to fill in (14) that remaining time slot on  
 their cable system.  
 (15) This is what used to be called part  
 time (16) carriage.  
 (17) After the cable rules were  
 abolished, part (18) time carriage,  
 essentially, becomes no longer an (19)  
 issue. And there isn't anything any  
 longer that (20) constitutes part time  
 carriage here.  
 (21) You can see that the numbers are  
 identical (22) throughout. So, either  
 one of those columns is going (23) to  
 tell you the exact same thing.  
 (24) MR. STEWART: Now, this printout  
 provides (25) these data for each  
 station, ranked in descending

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(1) order by the number of full time distant subscribers. (2) Do you see that?

(3) THE WITNESS: Yes.

(4) MR. STEWART: So that WTBS is carried to (5) some 44 million as a distant signal, is that correct?

(6) THE WITNESS: Yes.

(7) MR. STEWART: And then WGN to 23 million (8) and some?

(9) THE WITNESS: Yes.

(10) MR. STEWART: Let's shift one column to (11) the left and look at the number of cable systems (12) again.

(13) THE WITNESS: Okay.

(14) MR. STEWART: WTBS is carried by 2,090 as (15) a distant signal and WGN carried by 1,237. Do you see (16) that?

(17) THE WITNESS: Yes.

(18) MR. STEWART: Some of those 1,237 are the (19) same systems that carry WTBS, of the 2,090 that carry (20) WTBS, is that correct?

(21) THE WITNESS: Yes. Quite a few of them. (22) We found that the most common cable carriage pattern (23) is to carry those two signals, and that's done by 25 (24) per cent of the systems.

(25) MR. STEWART: Okay. And when you look at

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(1) distant incidents, or instances of carriage, what you (2) do is add up those numbers. If you wanted to find the (3) total instances of carriage of TBS and GN together, (4) you would simply add those two numbers, is that (5) correct?

(6) THE WITNESS: Yes.

(7) MR. STEWART: That would give you some (8) idea of the availability of those two stations in the (9) distant signal marketplace, nationwide?

(10) THE WITNESS: Yes.

(11) MR. STEWART: Let's look down the list, (12) starting with WTBS, and identify the seven super (13) stations that you featured in your testimony here.

(14) THE WITNESS: The first five system (15) signals, WTBS, WGN, WWOR, WPIX and WSBK are all in the (16) list of super stations that I presented. Three places (17) further down is KTLA in Los Angeles. Then further (18) down the page, around the middle, is KTVT, channel 11 (19) in Fort Worth.

(20) MR. STEWART: So, it's just about at the (21) mid-point of the list.

(22) The first five super stations each are (23) carried by more distant cable subscribers than any (24) other?

(25) THE WITNESS: Those five stations reach

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(1) more distant subscribers than anyone else, yes.

(2) MR. STEWART: With respect to the other (3) two super stations, some other stations are carried to (4) more distant subscribers, is that correct?

(5) THE WITNESS: Yes.

(6) MR. STEWART: Do you know whether any of (7) the other stations in that first 20 or 25 are also (8) carried on satellite or are available on satellite?

(9) THE WITNESS: I don't know the specific (10) identities. I understand there may be a couple of (11) network-affiliated stations in that list as well.

(12) ARBITRATOR WERTHEIM: Would you call KTLA (13) and KTVT not-so-super super stations?

(14) THE WITNESS: I'm not going to (15) characterize them in that way, Your Honor. If you (16) would like to do so, you may.

(17) ARBITRATOR WERTHEIM: All right. The term (18) super station simply means it's broadcast by (19) satellite, it's carried by satellite?

(20) THE WITNESS: According to -- yes. I (21) mean, if you look at the glossary that was submitted (22) on behalf of the sports claimants, I believe that's (23) the definition.

(24) ARBITRATOR WERTHEIM: Is that the way the (25) term is generally used?

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(1) THE WITNESS: The industry, I think (2) generally, tends to look at independent stations that (3) are carried by satellite as super stations. I think (4) that's going to be a matter of some discussion here.

(5) MR. STEWART: I think, Your Honor, that (6) the Section 119 statutory definition which applies to (7) the other compulsory licenses uses the term super (8) station to refer to independent stations delivered by (9) satellite and not net-work affiliates delivered by (10) satellite.

(11) Whether that is the same use in which the (12) witness is using it or not --

(13) I have no further questions.

(14) CROSS EXAMINATION (15) BY MR. HESTER

(16) MR. HESTER: For the record, I'm Timothy (17) Hester representing the public television claimants.

(18) Good morning, Doctor Lemieux.

(19) THE WITNESS: Good morning.

(20) MR. HESTER: Let me follow-up very quickly (21) on Mr. Stewart's exhibit NAB-1990-92, exhibit 1-X.

(22) If I could take you back to your (23) discussion of KTLA and KTVT, your

reference to those (24) two super stations and where they ranked among the (25) full time distant subscribers.

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(1) THE WITNESS: Yes.

(2) MR. HESTER: Am I correct in reading this (3) exhibit that there is an educational station that is (4) listed, WVIA that has more full time distant (5) subscribers than KTLA, the super station out of Los (6) Angeles?

(7) THE WITNESS: Yes.

(8) ARBITRATOR WERTHEIM: What station?

(9) MR. HESTER: I'm sorry.

(10) THE WITNESS: Number six ranked station.

(11) MR. HESTER: WVIA which is listed out of (12) Scranton, Pennsylvania.

(13) ARBITRATOR WERTHEIM: That's an (14) educational station?

(15) THE WITNESS: That's what it says here, (16) yes.

(17) MR. HESTER: Could you clarify by the (18) reference to educational? Is that also a reference to (19) non-commercial stations?

(20) THE WITNESS: Yes. It is a non-commercial (21) educational station.

(22) MR. HESTER: So, immediately behind the (23) five super stations you list the largest distant (24) signal in terms of full time distant subscribers as (25) this non-commercial station out of Scranton, is that

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(1) correct?

(2) THE WITNESS: In terms of subscribers, (3) yes.

(4) MR. HESTER: And then following it a (5) little further down, do you see also a reference to (6) WTTW, channel 11 out of Chicago?

(7) THE WITNESS: Yes.

(8) MR. HESTER: And that is also a non- (9) commercial station?

(10) THE WITNESS: Yes.

(11) MR. HESTER: And in terms of full time (12) distant subscribers that ranks above KTVT, is that (13) correct?

(14) THE WITNESS: Yes.

(15) MR. HESTER: And there is also one other (16) non-commercial station that ranks ahead of KTVT. Do (17) you see the reference there to KCET out of Los (18) Angeles?

(19) THE WITNESS: Yes.

(20) MR. HESTER: In your testimony, at various (21) points, you discuss educational stations. Do you (22) recall that in your testimony?

(23) THE WITNESS: Yes.

(24) MR. HESTER: Am I correct that those (25) references are to signify non-commercial stations?

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- (1) THE WITNESS: Yes. I believe at the (2) beginning of the report I refer to them as non- (3) commercial educational station and then I refer to (4) them as educational stations later on as a short hand.
- (5) MR. HESTER: So, for instance, if I could (6) direct your attention to the table that we discussed (7) at some length today, on page 10 of your testimony, (8) table 5-1 on instances of carriage; do you have that (9) table?
- (10) THE WITNESS: Yes, I do.
- (11) MR. HESTER: And there is a line reference (12) to educational. That's meant to be educational and (13) non-commercial stations?
- (14) THE WITNESS: Yes.
- (15) MR. HESTER: What is commonly referred to (16) a public television?
- (17) THE WITNESS: Yes.
- (18) MR. HESTER: Let me ask you to turn back (19) to page 9 in your testimony, please. I want to direct (20) your attention, specifically, to the bottom paragraph (21) on page 9, the third sentence which reads, "Only (22) distant carriage of the original super stations and (23) educational signals grew during this period." (24) Do you see that?
- (25) THE WITNESS: Yes, I do.

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- (1) MR. HESTER: The period you are referring (2) to is what?
- (3) THE WITNESS: 1989 to 1992. The second (4) accounting period in both cases.
- (5) MR. HESTER: So, your reference there to (6) educational signals is again to non-commercial public (7) television?
- (8) THE WITNESS: Yes.
- (9) MR. HESTER: So, your point is that the (10) only two types of signals that grew in terms of (11) distant signal carriage were the original super (12) stations and public television?
- (13) THE WITNESS: Yes, non-commercial (14) educational stations.
- (15) MR. HESTER: Let me ask you if that point (16) is also reflected on table 5-1 on page 10?
- (17) THE WITNESS: Yes, it is.
- (18) MR. HESTER: And if you could also explain (19) that, please? Just describe for the record what your (20) data show as to the carriage of educational, non- (21) commercial television.
- (22) THE WITNESS: In the second accounting (23) period in 1989, we found 497 cable systems that (24) carried a non-commercial educational

station on a (25) distant basis which represented 6.8 per cent of all

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- (1) the instances of carriage in that year.
- (2) By 1992, that figure had risen 7.2 per (3) cent to 533 stations carried cable systems, or 7.2 per (4) cent of the entire number of instances.
- (5) MR. HESTER: And again, when you are (6) talking about the entire number of instances, you are (7) talking about instances of distant signal carriage?
- (8) THE WITNESS: Instances of distant signal (9) carriage.
- (10) MR. HESTER: So, am I right that this (11) table reflects that in per centage terms, public (12) television's distant signal carriage grew by 7.2 per (13) cent during this period?
- (14) THE WITNESS: Yes.
- (15) MR. HESTER: Going back to the point that (16) we just discussed, beside WTBS and WGN, this is the (17) only kind of signals for which you show a growth in (18) distant signal carriage during this period?
- (19) THE WITNESS: That's correct.
- (20) MR. HESTER: Am I right also, in looking (21) at these figures, and let me focus you on the second (22) accounting period for 1992 if I could, that your data (23) here show that the distant signal carriage of public (24) television signals was roughly double that of the (25) other super stations you list here?

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- (1) THE WITNESS: Yes. That is correct. (2) Taken together as a group.
- (3) MR. HESTER: So, what I wanted to do is (4) ask you to simply confirm the aggregation that you (5) show other super stations here of WPIX, SBK, KTLA AND (6) KTVT, and those in the aggregate amount to distant (7) signal carriage of 3.7 per cent?
- (8) THE WITNESS: Yes.
- (9) MR. HESTER: And public television, during (10) the same period is essentially double that at 7.2 per (11) cent?
- (12) THE WITNESS: Yes.
- (13) MR. HESTER: let me ask you to turn to (14) page 30 of your testimony, please. Table 10-1 at the (15) bottom of the page is what I wanted to discuss with (16) you.
- (17) Again, you see a reference in the headings (18) to educational, and again does that refer to public (19) television, educational, non-commercial?
- (20) THE WITNESS: Yes.
- (21) MR. HESTER: And so this shows, if you (22) look at the columns for 'Other Super Stations' versus (23) 'Public

Television' figures, that essentially public (24) television, on average, was carried twice as often as (25) a distant signal as were the other super stations?

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- (1) THE WITNESS: Yeah, I think we can make (2) that -
- (3) MR. HESTER: In other words -
- (4) THE WITNESS: I assume - that's (5) fundamentally the same relationship we saw in the (6) other table, yes.
- (7) MR. HESTER: These figures in table 10-1 (8) are ultimately derived from the same data that you (9) show in table 5-1?
- (10) THE WITNESS: Yes. Down the line data is (11) all the same, yes.
- (12) MR. HESTER: And the categorizations that (13) you show in table 10-1 are the same categories?
- (14) THE WITNESS: The same six categories, (15) yes.
- (16) MR. HESTER: the same six categories you (17) show in table 5-1?
- (18) THE WITNESS: Yes.
- (19) ARBITRATOR WERTHEIM: The change that Mr. (20) Hester just asked you about, or rather the comparison, (21) is rather dramatically different, is it not, between (22) the top 50 and the smaller stations?
- (23) The smaller the station, the greater the (24) gap with the educational?
- (25) THE WITNESS: The smaller the market.

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- (1) ARBITRATOR WERTHEIM: Yes.
- (2) THE WITNESS: Yes.
- (3) ARBITRATOR WERTHEIM: And in the top 50 (4) they are about equal?
- (5) THE WITNESS: Yes.
- (6) ARBITRATOR WERTHEIM: Thank you.
- (7) MR. HESTER: And then below the top 50 (8) there is a difference in terms of the per centage of (9) carriage of educational and non-commercial as compared (10) as to the other super stations?
- (11) THE WITNESS: Yes.
- (12) MR. HESTER: The comparison that I had (13) drawn before, asking you to agree with me that, on (14) average, the carriage of public television signals was (15) twice that of the other super stations was based on a (16) reference to the bottom line, reference to all (17) systems?
- (18) THE WITNESS: That is correct.
- (19) MR. HESTER: And do you agree with me that (20) that shows, on average, looking at all systems, this (21) reflects that public television signals were carried (22) twice as often distant signals in comparison to the (23) other super stations?

(24) THE WITNESS: I would say that is a fair (25) interpretation, yes.

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(1) MR. HESTER: Let me ask you if I could to (2) direct your attention to page 31, table 10-2.

(3) Again, this is a table that you have (4) discussed before. It shows the patterns of distant (5) signal carriage that you have observed by reviewing (6) the statement of accounts?

(7) THE WITNESS: Yes.

(8) MR. HESTER: I wanted to ask you if you (9) could, to again confirm that the references to EDUC (10) that appear starting at number 11 and continuing on (11) for several of these. I take it that is a reference (12) to public television signals?

(13) THE WITNESS: Yes, non-commercial, (14) educational stations.

(15) MR. HESTER: So, if I focused on, let's (16) say, item 13 in your listing here, this is a pattern (17) that you observed, of distant signal carriage of WTBS, (18) WGN and then you list an educational signal.

(19) THE WITNESS: Yes.

(20) MR. HESTER: That would be a reference to (21) public television signals being imported as a distant (22) signal?

(23) THE WITNESS: Yes.

(24) MR. HESTER: Okay. If you will accept my (25) math, would you agree with me that one could add

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(1) together the per centage of systems in your patterns (2) here that show some distant signal carriage of public (3) television signals and determine the per centage of (4) systems are that imported a public television signal?

(5) THE WITNESS: Yes, plus some of them are (6) also in the 'Other Patterns' category at the bottom.

(7) MR. HESTER: Okay. If we focus on those (8) that you list in your top 25 signal patterns, would (9) you agree with me that numbers 11, 12, 13, 14, 15, 16, (10) and 19 from among your top 25 all show a pattern of (11) importing a public television signal?

(12) THE WITNESS: Yes.

(13) MR. HESTER: And in the aggregate, those (14) patterns add to 12.7 per cent. You can check my math (15) if you want, but the way that I have derived that and (16) I will represent to you that I have derived it by (17) adding together the 'Per Cent of Systems' column.

(18) Do you agree with me?

(19) THE WITNESS: Yes, 12.7.

(20) MR. HESTER: You are better at it

than I (21) am.

(22) The 12.7 number reflects the per cent of (23) systems, aggregated together from among these top 25 (24) that show a public television signal?

(25) THE WITNESS: It is the sum of 2.5, 2.4,

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(1) 2.1, et cetera.

(2) MR. HESTER: Okay. Now, you mentioned (3) earlier in your testimony today, an example out of the (4) Washington market in which the observation was that (5) the cable system here in Washington, D.C. imports (6) network-affiliates as distant signals from Baltimore.

(7) Do you recall that?

(8) THE WITNESS: I believe that's true.

(9) MR. HESTER: Am I right that taking that (10) example a step further along the lines of Mr. (11) Stewart's discussion, am I right that in that example (12) the network affiliate programming coming from (13) Baltimore would be different from the network (14) affiliate programming found on the local station here (15) in the district?

(16) THE WITNESS: In the non-network portion (17) of the day, yes.

(18) MR. HESTER: There would be some elements (19) of the programming that would be the same on the (20) network affiliate being imported from Baltimore as (21) contrasted with the local affiliate. But some amount (22) of the programming would be different?

(23) THE WITNESS: Yes.

(24) MR. HESTER: You had discussed yesterday, (25) the distant signal equivalents that apply to the

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(1) royalty computations with respect to independent (2) stations, network stations and non-commercial (3) stations. Do you recall that?

(4) THE WITNESS: Yes.

(5) MR. HESTER: And your testimony was that (6) the distant signal equivalent for an independent (7) station is 1 and the DSE for a network affiliate is (8) .25 and for a non-commercial station it is .25. Is (9) that right?

(10) THE WITNESS: Yes.

(11) MR. HESTER: And those distant signal (12) equivalents were included by Congress in the original (13) copyright legislation during the 1970s, is that your (14) understanding?

(15) THE WITNESS: Yes.

(16) MR. HESTER: Has there been an effort to (17) calibrate those distant signal equivalents since that (18) time?

(19) THE WITNESS: Not that I know of.

I (20) believe they are frozen by statute.

(21) MR. HESTER: Right. So there have not (22) been on-going adjustments in the DSE rates to take (23) account of market conditions?

(24) THE WITNESS: No. They are the same rates (25) that we used in the 1978 proceeding.

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(1) MR. HESTER: I take it you would agree (2) that a cable system could well pay a royalty rate that (3) is substantially below the value that it would place (4) on a given distant signal?

(5) THE WITNESS: If you are asking me if I (6) think that the compulsory license rewards copyright (7) holders to the full value of their programming, I'd (8) say the answer to that is no.

(9) MR. HESTER: And that a cable operator (10) could well be paying less than the value it places on (11) a given signal?

(12) THE WITNESS: That is certainly possible.

(13) MR. HESTER: Thank you. Those are all the (14) questions I have.

(15) CHAIRPERSON JIGANTI: Any other cross (16) examination?

(17) MR. COSENTINO: Your Honor, I have about (18) twenty minutes worth of questions.

(19) CHAIRPERSON JIGANTI: We will break now. (20) Yesterday was the first day had here and I didn't know (21) if an hour was enough time for you to have lunch. Is (22) it a sufficient amount of time?

(23) All right, we will meet back here in an (24) hour.

(25) MR. GERSCH: Your Honor, I wonder if I

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(1) could raise a couple of housekeeping issues; if you (2) would prefer to take them up after lunch, we could.

(3) CHAIRPERSON JIGANTI: It would be a good (4) time now because we could discuss them at lunch.

(5) MR. GERSCH: There are a number of motions (6) with respect to Mr. Bortz who will be the joint sports (7) claimants' next witness and we wondered if the Panel (8) had ruled on those motions?

(9) CHAIRPERSON JIGANTI: We have ruled on (10) them. They are in the process of being typed and (11) explained.

(12) Do you need them before Mr. Bortz (13) testifies?

(14) MR. GERSCH: I guess it depends on what (15) they are.

(16) CHAIRPERSON JIGANTI: Can we

talk to you (17) at one o'clock about that?

(18) MR. GERSCH: Sure.

(19) CHAIRPERSON JIGANTI: After lunch we will (20) address that.

(21) Okay. Anything else? Any other (22) housekeeping matters.

(23) MR. GERSCH: The other issue is just one (24) of maybe just a question of formality. I would like (25) to be clear on when an exhibit is admitted.

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(1) My understanding is basically, an exhibit (2) is not admitted until the Panel says so. I believe (3) there is a reference by one of the counsel's to an (4) exhibit having been admitted yesterday, which was (5) never offered into evidence.

(6) I would just like to be clear on what the (7) ground rules are.

(8) CHAIRPERSON JIGANTI: That's a good (9) question. We began discussing it before we resumed (10) here a while ago.

(11) My understanding of it was that there was (12) something procedures concerning the admission that (13) would be different from ordinary court proceedings. (14) I may not be accurate on that and I would like to (15) check it out before we address it.

(16) Two things we have to address after lunch (17) are the motions and the question of when a matter is (18) admitted as an exhibit.

(19) MR. NEIMAN: Just related to that, Your (20) Honor, there were two cross-examination that were used (21) in connection to Dr. Lemieux's testimony. One is the (22) NAB's exhibit 1-X; I would like to have the entire (23) copy put into the record.

(24) And the other is the program suppliers. (25) I just want to make clear that under the rules, my

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(1) understanding is that is not in as substantive (2) evidence until they put that sponsoring witness (3) forward.

(4) CHAIRPERSON JIGANTI: That was exactly the (5) nature of our conversation, before we broke here. I (6) will address those immediately after lunch.

(7) Mr. Stewart, do you have a question?

(8) MR. STEWART: Yes, Your Honor, I would be (9) happy to provide the remainder of the listing of which (10) I provided the first page as exhibit 1-X. I'd ask to (11) please not provide all the data for all the years in (12) this printout. It is bulky and unnecessary.

(13) CHAIRPERSON JIGANTI: Okay. We'll discuss (14) that.

(15) MR. HESTER: Your Honor, I have one (16) specific suggestion. There was a discussion yesterday (17) of the form of account that we worked on for some (18) amount of time and I thought it might be appropriate (19) to mark that; that would be my suggestion.

(20) CHAIRPERSON JIGANTI: The way it was (21) introduced yesterday, it was suggested that the Court, (22) the Panel could take judicial notice of it.

(23) But you prefer to have it marked as an (24) exhibit?

(25) MR. HESTER: Well, I think that later on

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(1) it might be difficult to find it. Years from now we (2) might all be gray and trying to find this again, I (3) hate to say.

(4) CHAIRPERSON JIGANTI: I'm inclined to (5) agree with you. I think it should be marked as an (6) exhibit.

(7) That was brought about by Mr. Lane?

(8) MR. HESTER: Yes.

(9) CHAIRPERSON JIGANTI: The last number I (10) have for you is number 8 so those would be numbers 9 (11) and 10.

(12) MR. LANE: All right. Just so the record (13) will be clear, I will make SA 1 and 2, the short form, (14) the statement of account number 9, and the form 3.

(15) (Whereupon, the above referred (16) to documents were marked as PS (17) exhibits 9 and 10 for (18) identification.)

(19) CHAIRPERSON JIGANTI: With that in mind, (20) we will see you in one hour.

(21) (Whereupon, the proceedings were recessed (22) at 12:09 p.m.)

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(1) A-F-T-E-R-N-O-O-N  
P-R-O-C-E-E-D-I-N-G-S

(2) (1:14 p.m.)

(3) CHAIRPERSON JIGANTI: I guess there's no (4) reason to interrupt Dr. Lemieux's testimony, we can (5) cover those other matters later on, and let (6) Dr. Lemieux be relieved for a little while.

(7) THE WITNESS: Thank you, Your Honor.

(8) MR. COSENTINO: Dr. Lemieux, my name is (9) Victor Cosentino, I'm representing the Canadian (10) claimants here today.

(11) CROSS EXAMINATION

(12) BY MR. COSENTINO:

(13) Q Dr. Lemieux, can you open Program (14) Supplier, Exhibit 10-X, which is the Statement of (15) Account, Form 3.

(16) A What exhibit number did you refer to?

(17) Q 10-X. I think here on page 10 it (18) describes the DSE values for the different signal (19) types.

(20) A Yes.

(21) Q Can you tell me how foreign signals are (22) treated under this DSE schedule?

(23) A They're treated the same way as (24) independent stations, and they've got full 1.0 DSE.

(25) Q So turning to NAB Exhibit 1-X--And also,

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(1) we've heard that American stations are marked as W (2) something or K something. Canadian stations, how are (3) they designated?

(4) A They have a call sign that begins with C.

(5) Q So all Canadian stations would have that (6) call sign as the first letter?

(7) A I believe so, yes.

(8) Q And if you'd look in Exhibit 1-X down the (9) column here can you find a Canadian station for us?

(10) A Sure. CBUT in Vancouver is the first one.

(11) Q And the designation of type is I.

(12) A Yes.

(13) Q So the only way we'll be able to tell (14) Canadian stations from other independent stations is (15) by the call sign itself, essentially.

(16) A That's how I did, yes.

(17) Q And while we have this exhibit out, CBUT (18) is listed here as the seventh, in terms of full-time (19) distance subscribers?

(20) A I believe that's right.

(21) Q And that follows immediately after the (22) first five super stations and the educational station (23) out of Scranton?

(24) A Yes.

(25) Q And CBUT has more subscribers than two of

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(1) the super stations that are delivered by satellite, is (2) that correct?

(3) A Yes.

(4) Q Going back to the Statement of Account (5) form, I have some more questions about how royalties (6) are calculated here. I think we got into that (7) yesterday somewhat and I want to explore it a little (8) further.

(9) First of all, the Statement of Account (10) form refers to base rates fees. Is that the same as (11) basic royalties as it appears on your exhibits? (12) A You want to show me where that is?

(13) Q Sure. If you look at the top of page 11 (14) it says computing--

(15) ARBITRATOR WERTHEIM: Which exhibit number (16) are you referring to



now?

(17) MR. COSENTINO: Exhibit 10-X again, Your (18) Honor.

(19) ARBITRATOR WERTHEIM: Thank you.

(20) MR. COSENTINO: At the top of page 11 it (21) says computing the base rate fee. I just want to (22) clear up that terminology.

(23) THE WITNESS: Yes, I'm usually referring (24) to what we refer to typically as basic royalties is (25) what is discussed here as the base rate fee. I might

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(1) add that all Form 3 cable systems have to pay some (2) royalty, even if they don't carry any distant signals (3) at all. That's what's meant here by the minimum fee. (4) That compulsory license requires the payment of a (5) royalty fee for the right to carry a signal even if (6) one is not carried at all. So there are a few I (7) believe, maybe a couple dozen systems that are filed (8) on Form 3 but don't have any distant signals but (9) nevertheless will pay a royalty.

(10) BY MR. COSENTINO:

(11) Q And that royalty is equivalent to the (12) first full DSE on the sliding scale?

(13) A Yes, I believe so.

(14) Q In this form, in calculating the base rate (15) fee, it also discusses partially distant signals. Can (16) you explain what they are?

(17) A Sure, I'll try.

(18) Imagine we have a cable system that's (19) located on the edge of the 35 mile zone of a local (20) broadcast station. So let's take an example. There's (21) a cable system in Atlanta, that's not in the city of (22) Atlanta, but let's say is in a relatively distant (23) suburb. Part of the cable system is inside the (24) 35 mile zone; part of the cable system is outside the (25) 35 mile zone. The operator is required to pay

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(1) royalties for the carriage of WTBS, even though WTBS (2) would be a local signal within the 35 mile zone there (3) are some subscribers for whom it's distant and for (4) those subscribers a royalty fee is required. That's (5) what's meant by partially distant. It typically (6) refers to systems that have some of their subscribers (7) within the 35 mile zone of a TV station and some of (8) their subscribers the 35 mile zone of a TV station and (9) some of their subscribers are outside the 35 mile (10) zone, so it's sitting on the border

of the market.

(11) Q So a system that had some partially (12) distant subscribers to calculate base royalties it (13) would break apart its group of subscribers into one or (14) more groups?

(15) A Yes. The operator has to designate how (16) many subscribers are in each of—it could be a (17) number of different categories depending upon how many (18) different stations overlap here and so forth. But (19) eventually you end up with some number of so called (20) partially distant groups for which a royalty is (21) required.

(22) Q And then for each of those partially (23) distant groups the cable operator looks at what (24) signals are just distant to those groups?

(25) A That's right.

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(1) Q And the process of calculating base (2) royalty is the same?

(3) A Right. It's only for that portion of (4) gross receipts that comes from that subscriber base.

(5) Q Right. So they're only paying base (6) royalties for signals that subscribers receive (7) distantly, so they'll never have a subscriber who's (8) got a local signal paying a base royalty—

(9) A That's correct.

(10) Q — because they're cut out of that group?

(11) A Yes. I believe the way this happens in (12) practice is they calculate a fractional DSE so that if (13) ten percent of their subscribers are partially distant (14) they would calculate a .10 DSE for an independent (15) station that's carried on this basis.

(16) Q Do they do that or does Cable Data (17) Corporation do that?

(18) A No, the operators do it when they file (19) Form 3.

(20) Q If you'll look at page 18 of the DSE (21) schedule, Exhibit 10-X. This would be the area where (22) they break it into their individual communities or (23) individual subscriber groups, correct?

(24) A Yes.

(25) Q And then the list only the signals that

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(1) were distant in that subscribers group.

(2) A Yes.

(3) Q And what the DSE was for that group. And (4) they total it up, and then they calculate the base (5) rate which is the basic royalties.

(6) And if you look on the proceeding

page, (7) page 17, it tells us how to compute the base rate fee (8) for each subscriber group?

(9) A Yes.

(10) Q Do you see that?

(11) A Yes.

(12) Q And then it says at the bottom, on the (13) last part, it says, computer base rate fee for each (14) subscriber group using the formula outlined in Block B (15) of Part 8.

(16) Could you read that and tell us is that (17) the normal way of computing the basic royalties?

(18) A I believe so, yes.

(19) Q Okay. So they just pretend that for the (20) purposes of this that each subscriber group is its own (21) little system?

(22) A That's more or less correct, yes.

(23) Q And then they sum up all the base fees.

(24) A Right.

(25) And actually now in response to your other

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(1) question I guess, it's not the case that they provide (2) these fractional DSEs, that's actually done by Cable (3) Data Corporation.

(4) Q Turning to Cable Data Corporation. They (5) take the Statement of Accounts and pull from them the (6) information that you used ultimately to come up with (7) the basic royalty rates that you use in your report. (8) A That's correct.

(9) Q And if we go to the Joint Sports (10) Exhibit 2, your report—if we go to page 13. It is (11) 6.1 (12) When you allocate royalties to a specific (13) signal such as WTBS, you do that using the data from (14) Cable Data Corporation, is that correct?

(15) A Yes, that's the basic data that's (16) involved. For systems that carry a 3.75 signal I (17) allocate basic royalties in the way that we discussed (18) earlier in the discussion about 3.75 allocations.

(19) Q Then could you explain—and I think you (20) touched on this yesterday actually, but can you (21) explain how—Say a system has, I think your example (22) was, an independent, a Canadian, an educational, and (23) a network affiliate, using that DSE schedule that we (24) looked at already, it generates a certain amount of (25) fees, \$25,000. How would the Cable Data Corporation

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(1) data break that out?

(2) A It would allocate \$10,000 to both the (3) Canadian and the independent station, and \$2,500 to

(4) the network affiliated station and the non-commercial (5) educational station.

(6) Q And using Cable Data Corporation's data (7) you would know exactly which signal the independent (8) was; you'd know if it was WTBS or WGN.

(9) A Yes.

(10) Q So you could sum up all the fees that Tom (11) Larson generated—that Cable Data Corporation for (12) WTBS.

(13) A Yes.

(14) Q And that's essentially what this is.

(15) A Yes.

(16) Q Is this method attributing the basic (17) royalties? I mean is it a reliable method? What does (18) it give us? It's not really an average, is it? What (19) does it present us, in terms of, how do we get from (20) the money that goes in to what's here?

(21) A Basically we're looking at how carriage (22) generates royalties. So I carry a full-time, distant (23) independent station, and that's the only signal I (24) carry then all the royalties that I pay would (25) presumably be paid for that signal. If I carry two

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(1) full-time distant independents, then those two signals (2) because they each have 1.0 DSE would each have (3) generated half of the total royalty payment.

(4) Q And this is the method that Cable Data (5) Corporation has come up with to allocate this?

(6) A I believe this was even used by people (7) prior to Cable Data Corporation in the 1978 and '79 (8) proceedings.

(9) Q And it's the procedure we all rely on to (10) figure out how much is allocated?

(11) A It has been customary in the past, yes.

(12) Q Now in your report, page 19 please. The (13) sentence actually starts at the bottom of page 18, "In (14) contrast independents carried the base grade cost (15) cable operators on average only 4 to 13cents per (16) subscriber per month. The cost for network affiliates (17) has ranged from 1 to 3.25 cents." (18) Can you read the next sentence, please, out (19) loud.

(20) A "No single figure can be given for basic (21) royalties because they are assessed on a sliding scale (22) depending on the total number of distance signals (23) carry."

(24) Q And can you explain what you meant by (25) that?

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(1) A Yes. Whereas before we say, in the other (2) half of the paragraph I say that, because 3.75 signals (3) are assessed at the 3.75 rate we can calculate that (4) that translates into 40cents on average per signal (5) per subscriber. But signals carried at the basic rate (6) are paid for in a declining scale, so that the first (7) signal that's carried is charged at the .893percent (8) rate; the second through fourth signal is charged at (9) a somewhat lower rate, and signals after the fourth (10) signal are charged at an even lower rate. So there's (11) not a unique number that we could say is what the cost (12) of a particular signal is. It depends upon where it (13) is and how many signals are carried overall.

(14) Q Right. And you're getting those rates, (15) .893, from Exhibit 10, page 11?

(16) A They're statutory.

(17) Q I'm looking at page 11.

(18) A I believe that's right. At the top of (19) page 11 of Program Suppliers 10-X there's block called (20) "Computing the Base Rate Fee", and they give the (21) percentage royalty rates for the first DSE, the (22) second, third and fourth DSE, and then ones beyond (23) number four.

(24) ARBITRATOR WERTHEIM: What page is that, (25) please?

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(1) THE WITNESS: Page 11 of Program (2) Suppliers, 10-X.

(3) ARBITRATOR FARMAKIDES: All right. Let me (4) understand this.

You're saying to us, as I understand (5) the other witness did too, that there was a base rate (6) applied to any cable system that picks up a signal, (7) that is able to pick up a signal whether or not it (8) picks up a signal.

(9) THE WITNESS: All cable systems are (10) required to pay a compulsory license.

(11) ARBITRATOR FARMAKIDES: That base rate is (12) calculated on a formula provided by law.

(13) THE WITNESS: Yes.

(14) ARBITRATOR FARMAKIDES: The gross receipts (15) will change in accordance with—The gross receipts (16) determine what that base fee will be?

(17) THE WITNESS: That's right.

(18) ARBITRATOR FARMAKIDES: Now in addition to (19) that you have a 3.75?

(20) THE WITNESS: Yes.

(21) ARBITRATOR FARMAKIDES: That is calculated (22) on another formula given by this particular exhibit, (23) this

SA-3.

(24) THE WITNESS: Yes.

(25) ARBITRATOR FARMAKIDES: Have you said

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(1) anything different from that at any time? That's what (2) I understood you to say.

(3) THE WITNESS: Yes.

(4) ARBITRATOR FARMAKIDES: Is there anything (5) different that you have in mind, counsel?

(6) MR. COSENTINO: No. I'm just trying to (7) clarify some of this.

(8) THE WITNESS: I guess what's being (9) discussed here is the fact that, if we look at the (10) basic fund and forget about the 3.75 for a moment, (11) when royalties are calculated the royalty rate that's (12) paid for a particular signal declines the more signals (13) the operator carries.

(14) ARBITRATOR FARMAKIDES: Yes, that's clear. (15) w; That's all that was being said.

(16) ARBITRATOR FARMAKIDES: That's all.

(17) MR. COSENTINO: Dr. Lemieux, one question (18) on this. In the past hasn't the tribunal treated the (19) different fees generated by each class royalty as a (20) different fund, 3.75 fund, the basic royalty fund? (21) And people have asked in their claims for a certain (22) percentage of different funds?

(23) THE WITNESS: Yes.

(24) MR. COSENTINO: And isn't part of that (25) just because they're calculated differently and it's

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(1) easier to calculate and handle them differently as (2) separate items, or is there some other reason for (3) keeping them separate?

(4) THE WITNESS: Well there's different (5) eligibility in the 3.75 fund than there is in the (6) basic fund. Some claimants have no eligibility in the (7) 3.75 fund. And there may be differences in the—And (8) there certainly are differences in the composition of (9) signal carriage in the 3.75 fund from the basic fund. (10) Not all signals that are carried in the basic fund (11) also get carried on the 3.75 basis. So to the extent (12) to which those differences and the composition of (13) signals reflects differences in content then there may (14) also be reasons for having different awards.

(15) BY MR. COSENTINO:

(16) Q Coming back to this page 19, where you say (17) the average of only 4 to 13cents per subscriber per (18) month, how did you come up with this



range of 4 to 13? (19) Just roughly. You don't have to recompute it here.

(20) **A Right.**

(21) Q I mean how would you come up with a (22) minimum and a maximum general?

(23) **A I believe what I did was find the average (24) number of DSEs. Well no. I think what I did was I (25) found the average gross receipts and then applied the**

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(1) **rates in the statute, so that the 13cents refers to (2) .893 percent of the gross receipts of an average (3) system, and the 4cents applies to the .265 percent.**

(4) Q So you could calculate a maximum and (5) minimum by saying, okay, this is the top of the scale (6) and this is the bottom of the sliding scale, and the (7) most that could be paid for a signal would be this (8) .893 percent and the least that could be paid is the (9) .265.

(10) **A Right.**

(11) Q Dr.Lemieux, I want to change topics a (12) little now. On page28 of your report, this concerns (13) regional distribution of flagship stations and super (14) stations. Taking a step back from this, you testified (15) earlier today about how distant signals are (16) transmitted. I think we heard three ways; satellite, (17) microwave and antenna on a mountain.

(18) Is that the basic method? Is that going (19) to really cover most of it?

(20) **A I believe so, yes.**

(21) Q Are you aware of limitations in antennas (22) or microwave transmission that might make it (23) unfeasible for a signal to be transmitted distantly (24) over great distances. Say, a system in San Diego (25) could not pick up over the air a Boston signal, right?

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(1) **A No, it couldn't.**

(2) Q And probably the same with microwave?

(3) **A No, microwave I don't necessarily think (4) would be the case but I don't really know, I'm an (5) engineer.**

(6) Q But would limitations of that type on over (7) the air transmission, whether it's by VHF or by (8) microwave, could that possibly account for why non- (9) super stations have such heavy carriage within the (10) same region, just that it's more easy to get the (11) signal in the same region?

(12) **A That may be a reason, yes; I don't think (13) it's the only reason.**

(14) Q And I think earlier today you

attributed (15) the success of super stations to the carriage of (16) sports and their presence on satellite.

(17) **A Yes.**

(18) Q Is that correct? And TBS seems to be the (19) lead super station by far. Is that a fair-

(20) **A That's a fair characterization, yes.**

(21) Q Do you think there are other reasons (22) besides sports carriage and satellite carriage that (23) TBS might be so successful?

(24) **A There may be.**

(25) Q Are you aware of-TBS is owned by Turner

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(1) Broadcasting, is that correct?

(2) **A That's true, yes.**

(3) Q And don't they also own TNT and CNN?

(4) **A Yes.**

(5) Q And CNN Headline News?

(6) **A I believe so, yes.**

(7) Q And I think the Cartoon Network?

(8) **A I think so, yes.**

(9) Q Could the possibility of packaging (10) arrangements whereby someone carries TBS they get a (11) better deal on these other networks, could that kind (12) of thing effect the carriage of WTBS on a national (13) basis?

(14) **A I'm not really the witness to ask this (15) stuff, I don't know.**

(16) Q Well, you are suggesting though that there (17) are reasons that these are carried so much, and you (18) did analysis on why WTBS was so important, and it's at (19) the top of all your charts. Have you looked at any (20) other reason other than just sports?

(21) **A No, I didn't see my role here as trying to (22) characterize why cable operators make the decisions (23) that they do. There's going to be a lot of other (24) evidence in the tribunals before the panel to discuss (25) that.**

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(1) Q So on a similar basis have you considered (2) the effect that say cable system ownership, Turner (3) Broadcasting would have on whether or not the cable (4) systems would carry it?

(5) **A No, I didn't look at any of these kind of (6) issues.**

(7) CHAIRPERSON JIGANTI: Dr.Lemieux, would (8) there be any relationship between a station and a (9) system and a tie in arrangement from selling-the (10) relationship between the station and the cable network (11) of joint ownership, and the selling of the

cable (12) network program which is in cable systems and TBS?

(13) THE WITNESS: I honestly don't know, Your (14) Honor. There may be, but I'm not-I don't know (15) enough about the contractual arrangements that WTBS (16) has with its client systems. As I say, I suspect (17) there are other witnesses that are going to testify (18) that would know about this than I do.

(19) MR. COSENTINO: Well, Dr.Lemieux, I think (20) that's all I have.

(21) ARBITRATOR FARMAKIDES: Can I raise a (22) question?

(23) Counsel, you asked the witness whether or (24) not there were three methods of transmission; mountain (25) top, the microwave and satellite.

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(1) Why did you omit these optic fibers, (2) because they would automatically put them through a (3) cable system? Assuming now that these new optic (4) fibers are going to be carrying tremendous amounts of (5) these signals, you exclude them because they are in (6) cable form? Is that what you were suggesting?

(7) THE WITNESS: No, I just don't think (8) they're a common method of distributing distant (9) signals. I may be wrong, but I don't believe so.

(10) ARBITRATOR FARMAKIDES: All right. That's (11) good enough. I just want to know.

(12) ARBITRATOR WERTHEIM: Were you referring (13) to over the air signals?

(14) THE WITNESS: I'm referring to, right, the (15) importation of distant signals.

(16) ARBITRATOR FARMAKIDES: And insofar as (17) you're concern that means over the air signals?

(18) THE WITNESS: Right. What I mean by a (19) distant signal is a broadcast station in some other (20) market.

(21) ARBITRATOR FARMAKIDES: Thank you.

(22) MR. COSENTINO: That's all.

(23) CHAIRPERSON JIGANTI: Any further cross (24) examination?

(25) MR. CAMPANELLI: The Devotional Claimants

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(1) have no questions.

(2) MR. NEIMAN: We have very very briefly, (3) director.

(4) REDIRECT EXAMINATION

(5) BY MR. NEIMAN:

(6) Q Dr.Lemieux, do you have NAB Exhibit1-X (7) in front of you?

(8) **A Yes.**

(9) Q Take a look at this exhibit. What

order (10) are these stations listed in here?

(11) **A They are listed by the total number of (12) distant cable subscribers that are able to watch them.**

(13) **Q** And I notice that there's a column, Total (14) Fee Gen. What does that refer to?

(15) **A In Larson's parlance it's the sum of all (16) basic and 3.75 percent royalties that he has allocated (17) to those signals.**

(18) **Q** And he does that based on the way the (19) cable operators fill out their forms?

(20) **A Right. He doesn't do any of the (21) reallocation of basic and 3.75 royalties that I do for (22) systems that carry a 3.75 signal.**

(23) **Q** Okay. But looking at the total Fee Gen (24) column, on this page what system had the highest total (25) fee generators?

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(1) **A What signal?**

(2) **Q** What signal? Yes. Thank you.

(3) **A WTBS.**

(4) **Q** And about what was its total?

(5) **A Just short of \$40million.**

(6) **Q** And what was the next one?

(7) **A WGN at \$20million, and then WWOR at (8) \$10million.**

(9) **ARBITRATOR WERTHEIM:** Are you looking at (10) Total Fees Generated?

(11) **THE WITNESS:** I'm looking in the Total Fee (12) Generated column. It's the sixth or seventh column (13) over in the middle of the page.

(14) **ARBITRATOR WERTHEIM:** Oh, I see, the other (15) one is just local fee.

(16) **THE WITNESS:** Right. There's a local (17) column, and Mr. Larson fails to give us enough room (18) here to see this space between the subscriber number (19) and the beginning of the fee number.

(20) **MR. NEIMAN:** And then the next two down (21) are PIX and SBK about \$1.5million each?

(22) **THE WITNESS:** Yes.

(23) **BY MR. NEIMAN:**

(24) **Q** And so amongst those top five you have a (25) total of about \$70million, \$71million?

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(1) **A A little over \$70million, yes.**

(2) **Q** And about what percentage of the total (3) royalties paid by all the systems for the second (4) accounting period in '92, was that \$71million?

(5) **A Give me a second for that.**

(6) **We had \$68million in basic and \$22million (7) in 3.75. So collectively there was about \$90million (8) paid**

**per carriage, and so this about 7/9, which I (9) guess is 77 or 78percent, something like that.**

(10) **Q** So these five super stations accounted for (11) about 78percent of the royalties generated?

(12) **A Roughly, yes.**

(13) **Q** And if you wanted to continue down the (14) list and put them in order to get the top ten on (15) Larson's list, how would that go? What would be the (16) next one?

(17) **A It appears the next one is CBUT in (18) Vancouver. And then I think the next one, it looks to (19) be WNAB in Lorraine. Is that correct?**

(20) **Q** Yes.

(21) **A That \$512,000.**

(22) **Q** So that's number seven?

(23) **A That's number seven. Number eight is (24) KTLA.**

(25) **Q** And that's one of the super stations?

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(1) **A Yes. And number nine I guess is WFLD in (2) Chicago. And number ten is KTVT in Fort Worth.**

(3) **Q** So of the top ten in fees generated on (4) Larson's list here, seven of them are super stations?

(5) **A Yes.**

(6) **Q** And the top five are super stations?

(7) **A Yes.**

(8) **MR. NEIMAN:** Nothing further of this (9) witness, Your Honor.

(10) **CHAIRPERSON JIGANTI:** I guess maybe I have (11) one question.

(12) You submitted a table here, 92 Regional (13) Distribution of Carriage, Royalties for Sports (14) Flagship Stations.

(15) **THE WITNESS:** Yes.

(16) **CHAIRPERSON JIGANTI:** Is there a (17) conclusion to be drawn from that or is that mere the (18) information?

(19) **THE WITNESS:** Well the conclusion is that (20) outside of the three original super stations, by far (21) the bulk of distant signal carriage of the rest of (22) these flagship stations is to cable systems that are (23) not all that far away from the location of the TV (24) station. This goes to a discussion that you gentlemen (25) had yesterday, about—I think it had to do with the

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(1) question about how interested it would be somebody in (2) Seattle, Washington to watch a Washington Bullets (3) basketball game.

(4) The evidence here suggests, leaving aside (5) the top three super stations, that's a fairly uncommon (6) occurrence. That is, it's not the case that the local (7) station that broadcasts

the Washington Bullets games (8) is being carried to Seattle, Washington. This (9) suggests it's being carried to other systems that are (10) in the Mid-Atlantic region which presumably has fans (11) that are of interest in the Washington Bullets.

(12) So that, while it's the case that the top (13) three signals have national distribution, and even (14) there we can see that for instance WWOR and WGN in (15) fact have a lot of their distribution in their own (16) region as well, outside of those signals most people (17) who are watching a distant signal are watching a (18) distant signal from someplace that's not all that far (19) away to them.

(20) I mean for instance, there are many (21) systems that are outside the 35mile zone but might (22) certainly be within 40 or 50miles of the cable (23) system, of the local station. Those are all distant (24) subscribers from the point of view of the law and (25) copyright royalties, but they're not all that far away

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(1) from the signal either.

(2) I grew up in a town that was 40miles (3) south of Boston, and at the lower end of my town some (4) people if they were on cable would have been distant (5) to the Boston TV stations because the line is (6) partially distant again. But that didn't mean that we (7) weren't Red Sox fans. That's our city; those were the (8) teams that we were loyal to. So we were distant (9) subscribers from the point of view of the law, but we (10) certainly weren't all that far away from the TV (11) station or the teams.

(12) **CHAIRPERSON JIGANTI:** With regard to the (13) distant signals then and the relationship with sports, (14) since it's mainly region it would seem that sports (15) programs that are on the super stations wouldn't have (16) much significance to the people who are watching them. (17) They don't take the stations out in Washington, only (18) 9percent of WGN goes outside of the region, and (19) 15percent of WOR goes out of the region.

(20) **THE WITNESS:** Right. But remember what (21) Commissioner Stern said yesterday, that if that were (22) really true then there wouldn't be any network (23) carriage of sporting events either. Why would NBC (24) want to carry a game between the Chicago Bulls and the (25) Washington Bullets to the entire country if they

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(1) didn't think that people in other parts

of the country (2) wanted to see the event because they enjoyed watching (3) basketball per se as opposed to—I mean, certainly (4) there's a lot of information about loyalty to teams, (5) but people are also interested in watching the sport (6) itself for the purpose of because they enjoy watching (7) the sport. And the networks take advantage of that. (8) They broadcast nation-wide coverage of events between (9) two particular local teams.

(10) CHAIRPERSON JIGANTI: Okay, I have no (11) questions. Anyone else? (12) Thank you very much. We appreciate your (13) testimony.

(14) THE WITNESS: Thank you, gentlemen.

(15) CHAIRPERSON JIGANTI: Before the next (16) witness we can take care of some of those other items (17) and then we'll take a break.

(18) CHAIRPERSON JIGANTI: The first matter is (19) the question of the motions. I believe they mentioned (20) they ruled on them previously, and there was a (21) question yesterday concerning the Joint Sports (22) Claimants and I told you what the ruling was. We (23) still don't have it in printed form for a couple of (24) reasons, not particularly noteworthy. But we do have (25) those rulings. We'll issue them orally now, and they

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(1) will be followed as soon as we can with a written (2) order.

(3) ARBITRATOR WERTHEIM: Well the panel has (4) reached a decision thus far, only with respect to the (5) motions addressed to the direct cases of the Joint (6) Sports Claimants and the National Association of (7) Broadcasters. We expect to be able to give you (8) rulings relatively soon on the remaining ones, but we (9) address these first because they come up soonest.

(10) These were all Program Suppliers' motions (11) to strike on a variety of grounds. With regard to the (12) National Association of Broadcasters' direct case the (13) four motions that were referred to the panel by the (14) copyright office are all denied, either on the merits (15) or as moot.

(16) With respect to the direct case of the (17) Joint Sports Claimants, all but one of the motions is (18) struck or denied, and the one that is granted was the (19) one characterized under subparagraph E-6 of the (20) copyright office ordered November 7. That motion was (21) directed to pages 10 to 11 of the Board's testimony (22) and

Table 1 concerning the Denver '95 channel guide. (23) That motion is granted on relevancy grounds. All the (24) other motions are denied. And as Judge Jiganti (25) indicated, a written order will be available shortly

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(1) with brief explanations.

(2) CHAIRPERSON JIGANTI: There is pending a (3) motion addressed concerning the Joint Support, and we (4) have no response yet. Will there be a response to it?

(5) MR. GARRETT: There will be a response, (6) Your Honor. We hope to get on file for tomorrow (7) morning with the court's indulgence.

(8) MR. STEWART: Your Honor, if you're (9) referring to the motion we received yesterday from (10) Mr. Lane, moving to strike the results of the 1990 (11) cable operators' survey, we also seek leave to respond (12) to that because we rely on that study as part of our (13) direct case, and I think that may be the case with (14) respect to other parties as well.

(15) CHAIRPERSON JIGANTI: Well anyway, it (16) suggests to me is that, one of the parties will file (17) the response tomorrow. Our question is when do you (18) want us to rule upon. And to know that we have to (19) know when you're handing the response.

(20) MR. GARRETT: Mr. Chairman, Mr. Trautman (21) will be available to testify as soon as Mr. Bortz's is (22) done, so obviously there's a need for us to respond (23) and you to issue a ruling before then.

(24) CHAIRPERSON JIGANTI: You said you will (25) have it tomorrow morning. The other parties here,

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(1) when they'll have their responses in.

(2) MR. STEWART: We would have preferred more (3) time given the circumstances, but we will file a (4) response tomorrow morning as well.

(5) CHAIRPERSON JIGANTI: All right. Anyone (6) else?

(7) MR. GERSCH: I recognize it's early in the (8) proceeding and I think we all appreciate the (9) decisiveness, and with respect to the decisions to (10) grant the motion to strike the Mile High table, I (11) guess we're in a little bit of a quandary. Had this (12) been granted by the copyright office we could have (13) gone out to microfilm and tried to replace it with (14) something. I know the MPAA which made that motion (15) yesterday questioned with respect to the same line (16) taken from yesterday's "New York Times", with respect (17) to Commissioner Stern, as

a matter of course I would (18) be loathed to ever make a request like this. I would (19) just like to move to reconsider on this one point, (20) because we're in a position where this is the exhibit (21) that's in his case. He's prepared to testify to 1995 (22) similar in 1992, typical and illustrative. (23) Again, the MPAA did use yesterday's, the (24) same line up for New York station from yesterday's— (25) ARBITRATOR WERTHEIM: Without objection.

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(1) MR. GERSCH: I'm sorry?

(2) ARBITRATOR WERTHEIM: They used it without (3) objection.

(4) MR. GERSCH: That's correct.

(5) ARBITRATOR WERTHEIM: But there's been an (6) objection raised in this case.

(7) MR. LANE: I might add this also was not (8) a line up of cable systems, it was a list of cable (9) networks.

(10) MR. GERSCH: It's just a—

(11) CHAIRPERSON JIGANTI: We're not in a (12) position to consider it. If you have a motion for (13) reconsideration, file your motion for reconsideration, (14) and make it, and we'll rule on it. Because of the (15) circumstances we'll rule on it as quickly as we (16) possibly can.

(17) MR. GERSCH: I understand, Your Honor, and (18) I appreciate it. I only raise it now because (19) Mr. Bortz is here. Thank you.

(20) CHAIRPERSON JIGANTI: The next order of (21) business is the question of the exhibits, and the (22) exact question raised is when is an exhibit admitted.

(23) MR. GERSCH: That's correct.

(24) CHAIRPERSON JIGANTI: Under the rules (25) here, I had a chance to check him. I was under the

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(1) impression there was a rule; 25146(g). There are two (2) rules actually (g) and (k).

(3) The first rule (g), "All written testimony (4) and exhibits will be received into the record, except (5) any to which the panel sustains an objection. No (6) separate motion will be required." (7) The next one is (k). "Documents that have (8) not been exchanged in advance may be shown to the (9) witness on cross examination. However copies of such (10) documents must be distributed to the panel and to (11) other participants, whether counsel adhering, before (12) being shown to the witness at the time of cross (13) examination, unless the panel objects otherwise." (14) Well

we've had a few of those problems here. (15) "If the document is not or will not be (16) supported by a witness for the cross examining party (17) that document can be used solely to impeach the (18) witnesses direct testimony, and it can on itself be (19) relied upon in findings of fact as rebutting the (20) witness' direct testimony. However upon leave from (21) the panel the document may be admitted as evidence (22) without a sponsoring witness if official notice is (23) proper or if in the panel's view the cross examined (24) party is the proper sponsoring witness." (25) Those are the rules I think we're bound

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(1) by, and the question concerns what exhibits now are we (2) talking about.  
(3) MR. GERSCH: The reason I raised the (4) question was because there had been no motion, until (5) today, with respect to any of the MPA's cross (6) examination exhibits, and I had in mind the exact (7) provision Your Honor cited. Then I believe there was (8) a reference—I may have misheard Mr. Lane—to one (9) of the exhibits yesterday. I thought he referred to (10) it as having been introduced into evidence, and my (11) understanding was nothing had been introduced into (12) evidence yesterday, and the only thing that was (13) introduced was introduced today.  
(14) CHAIRPERSON JIGANTI: The only ones (15) introduced today were the two DSE reports, and those (16) are Exhibits 9 and 10. I have the right numbers on (17) that?  
(18) MR. GERSCH: That's my understanding, Your (19) Honor.  
(20) ARBITRATOR WERTHEIM: Those were the two (21) we were asked to take official notice of.  
(22) CHAIRPERSON JIGANTI: We were asked to (23) take, but they were offered as exhibits today. I (24) think Mr. Lane offered them as an exhibit.  
(25) Am I correct, Mr. Lane?

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(1) MR. LANE: Yes.  
(2) CHAIRPERSON JIGANTI: All right. And was (3) there an objection to them?  
(4) MR. GERSCH: Not here.  
(5) CHAIRPERSON JIGANTI: Okay. So those two (6) exhibits will be admitted into evidence.  
(7) Now, as I understand now there are no (8) other Mr. Lane's exhibits that have been asked to be (9) admitted into evidence at this time. Am I correct?  
(10) MR. LANE: I'll make it easy. I'll move (11) the admission of Exhibits 1 through 8-X, Program (12) Suppliers'

Exhibits 1 through 8-X.

(13) CHAIRPERSON JIGANTI: Do you wish to make (14) objections to those exhibits?  
(15) MR. GERSCH: Yes, Your Honor, with regard (16) to Exhibit 8-X, I believe that there's no sponsoring (17) witness for that exhibit and we object to its (18) admission without a sponsoring witness. It wasn't (19) shown to us in discovery on the evidence.  
(20) ARBITRATOR WERTHEIM: That's the only one (21) you're objecting to?  
(22) MR. GERSCH: No, 3-X as well.  
(23) CHAIRPERSON JIGANTI: The first one we'll (24) consider will be 8-X.  
(25) MR. LANE: 8-X, Your Honor.

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(1) CHAIRPERSON JIGANTI: And the basis?  
(2) MR. NEIMAN: Mr. Lane represented that he (3) would provide a sponsoring witness later, and our (4) understanding is that it's not admitted and shouldn't (5) be admitted until he does so.  
(6) CHAIRPERSON JIGANTI: However, upon me, (7) from the panel the document may be admitted as (8) evidence without a sponsoring witness if official (9) notice is proper or if in the panel's view the cross (10) examined witness is the proper sponsoring witness.  
(11) So Mr. Lane, your response?  
(12) MR. LANE: I indicated we bring in a (13) sponsored witness.  
(14) CHAIRPERSON JIGANTI: So at the present (15) time—  
(16) MR. LANE: I move—if we don't come up (17) with a sponsoring witness.  
(18) CHAIRPERSON JIGANTI: At the present time (19) the motion is denied, which you will represent your (20) motion at a subsequent time.  
(21) Now the other—  
(22) MR. GERSCH: I'll withdraw my objection (23) for the other exhibit.  
(24) CHAIRPERSON JIGANTI: So the only exhibit (25) that is not then admitted then is Exhibit 8.

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(1) Okay, very good.  
(2) MR. STEWART: Mr. Chairman, I also follow (3) up and move for the admission of NAB-1992 Exhibit 1-X. (4) That's supplemented with the remainder of the pages (5) which I'll do tomorrow with Dr. Lemieux as the (6) sponsoring witness.  
(7) MR. NEIMAN: As long as the entire (8) document is submitted we have no objection.  
(9) ARBITRATOR WERTHEIM: You're talking about (10) the 390 page

document?

(11) MR. STEWART: No this is approximately a (12) 20 page printout of which I provided the first page (13) and about which I questioned Dr. Lemieux on the entire (14) printout.  
(15) CHAIRPERSON JIGANTI: What are you asking (16) to have admitted into the evidence, those two pages or (17) those in the entire supporting document?  
(18) MR. STEWART: Perhaps I should do it in (19) the context of handing you the complete copy which (20) I'll do tomorrow morning.  
(21) CHAIRPERSON JIGANTI: I think it'd be a (22) better idea. So you can withdraw that.  
(23) MR. STEWART: I withdraw that.  
(24) CHAIRPERSON JIGANTI: Anything further? (25) We'll take ten minutes.

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(1) (Whereupon, the proceedings went off the (2) record at 2:00 p.m. and resumed at 2:16 p.m.)  
(3) MR. GERSCH: Joint Sports Claimants call (4) Mr. Paul Bortz. (5) Whereupon,  
(6) PAUL I. BORTZ (7) was called as a witness and, having first been duly (8) sworn, was examined and testified as follows:  
(9) DIRECT EXAMINATION  
(10) BY MR. GERSCH:  
(11) Q Would you state your name, sir?  
(12) A My name is Paul Bortz.  
(13) Q How are you employed?  
(14) A I am President of Bortz and Company, (15) Incorporated.  
(16) Q What type of business is Bortz and Company (17) engaged in?  
(18) A We are consultants in broadcasting, cable, (19) and professional sports.  
(20) Q I understand from your written testimony (21) that you represent a number of television industry (22) trade associations. Could you tell us what some of (23) those are?  
(24) A Yes. We represent a fairly broad range of (25) trade associations, have done work for them. This

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(1) includes the National Association of Broadcasters, the (2) National Cable Television Association, the Cable (3) Television Administrative and Marketing Society. I (4) think they have recently changed the name slightly, (5) but it is basically the marketing professional society (6) of cable television. APTS, which is America's Public (7) Television Stations, representing the individual

non- (8) commercial stations in the country. We have done work (9) for PBS, Public Broadcasting Service, and for CPB, (10) Corporation for Public Broadcasting as well. Those (11) are the national associations that we represent.

(12) Q Generally speaking, what type of work do (13) you do for those trade associations?

(14) A Those have tended to be studies that have (15) addressed a number of broad issues that happen to be (16) of interest to them at the time. For example, the (17) National Cable Television Association, we did two (18) major pieces of work. One addressed the coming of (19) competition to cable from sources such as telephone (20) companies, direct broadcast satellites, wireless (21) cables, so called wireless cable, a way of (22) transmitting over the air a number of channels.

(23) We also for the National Cable Television (24) Association in association with Arthur Andersen and (25) Company, did a multi-year study which was the cable

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(1) operating performance benchmarks. With that, we work (2) with most of the major cable companies in developing (3) a detailed analysis of both their costs and their (4) revenues. Then that was aggregated in a number of (5) different ways and given to all of the companies along (6) with certain custom studies so that they could see how (7) effectively their systems were performing when put (8) against other systems.

(9) For APTS, we have most recently completed (10) some work looking at the potential and some of the (11) implications of having advertising on public (12) television. We did essentially a future of public (13) television study for them, which was then reprinted by (14) them and widely distributed across the country, (15) looking at all of the challenges facing public (16) television. This was before the new Congress was (17) elected, but they were really anticipating the kinds (18) of issues that they now face in terms of continuation (19) of funding. (20) For the National Association of (21) Broadcasters, we looked at sports on television. (22) Again, a report that was very widely circulated. It (23) looked at the implications to a television station of (24) the carriage of sports. We talked

about how you go (25) about negotiating a sports deal, how you go about

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(1) determining what the rights might be, what key terms (2) and conditions would be in there, what advantages (3) accrue to television stations through the carriage of (4) sports, a number of elements like that.

(5) Also for them, we did something called (6) Great Expectations, a television manager's guide to (7) the future, which was focused again at the station (8) level. This was done in the mid-1980s, looking (9) forward to what they were going to be facing in terms (10) of competition from cable television, increasing costs (11) pressures, decreasing audiences, a number of things (12) like that, a future looking study that we did at that (13) point.

(14) Q Have you also had occasion to work for (15) cable operators?

(16) A Yes. We work frequently with cable (17) operators. Our clients include TCI, (18)

Telecommunications Inc., which is the largest cable (19) operator. Time Warner, which is the second. Cox, (20) based in Atlanta. Comcast, which is another large (21) cable operator. And companies such as Providence (22) Journal, when they had cable systems, which they just (23) have sold to Continental Cable, and Times Mirror (24) Corporation, which has sold its systems just recently (25) to Cox Cable.

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(1) So many of the major players are clients (2) of ours.

(3) Q And I understand that your work for the (4) operators may be more proprietary and confidential (5) than the work for the trade associations, but can you (6) describe again in a general way what type of work it (7) is you do for cable operators?

(8) A Well, a lot of the focus recently has been (9) on the coming of competition. We look for them at (10) what the likelihood is of competition in their (11) marketplace, what they will be facing in terms of the (12) need to provide certain types of programming, what (13) their strategies might be related to pricing, how they (14) would go about marketing in the face of competition. (15) This gets down to the very specific system level.

(16) When we do this kind of work, these say (17) have been done for specific geographic clusters of (18)

systems. We work with people at the system level in (19) helping them develop plans to meet competition that (20) would be coming from telephone, again, from wireless (21) cable and from direct broadcast satellite, like direct (22) television, direct TV.

(23) Q Do you also have broadcast station (24) clients?

(25) A We have a number of broadcast station

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(1) clients. My oldest client in terms of continuous (2) relationship is ABC, American Broadcasting Company, (3) which was then acquired by Capital Cities, and is now (4) in the process of being acquired by Disney. They have (5) been a retainer client of ours since 1979.

(6) We work with them on a variety of things, (7) network, broadcast network issues. You may have seen (8) in the newspaper their announcement of a news cable (9) channel which was just in the paper today. That is (10) one that we assisted them in looking at the certain (11) aspects of that channel internationally.

(12) We work with them in their entry into the (13) cable business. In 1979, 1980, 1981, ABC was one of (14) the very first broadcasters to realize that they (15) shouldn't define their business as being a (16) broadcaster, and instead should define their business (17) as being in the television business, and let's get (18) into the cable side.

(19) As you may or may not be aware, they own (20) ESPN. We assisted them in valuing ESPN when they made (21) the purchase. We assisted them in the start up of (22) Lifetime and Arts and Entertainment channels, which (23) are also basic cable channels that are licensed to (24) cable operators.

(25) A number of other broadcasters. We work

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(1) with them at the station level as well as broader (2) strategic issues. We just finished some major work (3) for the Television Operators Caucus. That is a group (4) that consists of many of the major television group (5) owners, that own groups of stations across the (6) country. The members of the Caucus that participated (7) with us included Tribune, which also has WGN, Cox (8) Broadcasting, Meredith, Pulitzer, a number of other (9) large major

broadcasters that are associated with the (10) Caucus.

(11) We also work for the Providence Journal, (12) a company which is a major broadcaster.

(13) Q Coming back to the cable industry, have (14) you done work for what we refer to as cable networks? (15) A Yes. Cable networks have been clients of (16) ours for a long period of time. We have over the (17) years done a substantial amount of work for ESPN, the (18) sports network. As I said, our first acquaintance was (19) when ABC purchased it, but we have contracted (20) separately with them on a regular basis since then for (21) a number of studies.

(22) Channels like Lifetime, the Weather (23) Channel, the Travel Channel, E Entertainment, which is (24) sort of a show business entertainment focus, we have (25) worked with them from their start-up. And a large

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(1) number of channels that are still trying to start up. (2) I could go through a long list of that, but we work (3) with many, many cable networks.

(4) Q When was Bortz and Company founded? Was (5) that in 1988?

(6) A It was founded in 1988, yes.

(7) Q Could you give the panel a brief sketch of (8) what your experience was leading up to your founding (9) of Bortz and Company?

(10) A Yes. As we work back from there, from (11) 1979 to 1988, I was the Managing Director of Brown (12) Bortz and Coddington, BBC. During that time, you may (13) have noticed in my associate Jim Trautman's report we (14) conducted studies for the Joint Sports Claimants.

(15) The practice essentially was the same as (16) Bortz and Company. I was the Chief Executive Officer. (17) We did work across a whole host of areas, health care, (18) economic development, regional economics and energy. (19) I decided I wanted to get back my hands on the (20) communications side. So we set up Bortz and Company (21) in 1988. So that was 1979 to 1988.

(22) In 1978 and 1979, I did my time here in (23) Washington as Deputy Assistant Secretary of Commerce.

(24) That was in the Carter Administration. And actually (25) came back in early 1978 to combine the old White House

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(1) Office of Telecommunications Policy into some elements (2) of the Department of Commerce, and formed the National (3) Telecommunications and Information Administration, (4) NTIA, which still exists today, and is the Executive (5) Branch's chief policy making advisor to the President (6) on communications policy.

(7) Prior to that, I headed the Industrial (8) Economics Division at the University of Denver (9) Research Institute. It was while there in 1972 or (10) 1971 that I first began to do work in the television (11) business with my first client, in fact, being the old (12) White House Office of Telecommunications Policy.

(13) Prior to the University of Denver, I was (14) at the Ford Aerospace and Communications Corporation (15) in Newport Beach, California. That was work that was (16) primarily related to missile system development.

(17) Q This is not the first time you have had (18) occasion to appear in these proceedings. Is that (19) right?

(20) A That is correct.

(21) Q When was the first time you were involved (22) in doing a study in connection with the old CRT?

(23) A It was the 1983 proceeding, I believe, (24) that occurred in 1985 or somewhere around that time (25) frame.

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(1) Q What is it that the Joint Sports Claimants (2) have been asking you to do for them all these (3) years?

(4) A When they came to us they said what would (5) be the best way to estimate the relative value of (6) certain categories of programming that are carried on (7) distant signals, relative value to cable system (8) operators so that one could

determine in as accurate (9) a way as possible how you might allocate the total (10) funds that are paid in how a cable operator would (11) allocate those funds among the different categories.

(12) Q If I can just pursue here a question that (13) I believe one of the panel members asked of Dr. (14) Lemieux when he was here. This issue of whether - (15) there was a question raised that concerned why is (16) sports programming important if it is the case that (17) the number of hours are low and the ratings are low. (18) The question I have for you, Dr., I'm sorry, Mr. (19) Bortz, is what is it that makes sports valuable?

(20) A Well, we work of course with a

wide range (21) of programming, but sports is unique. It is live. It (22) is now. There's an emotional involvement of the (23) viewer that you don't get with other kinds of (24) programming. It is today's stars today. So it is (25) something that is very special and very important in

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(1) the scheme of programming as a result of that.

(2) Q And is the value of programming directly (3) related to the number of hours it is on the air or its (4) ratings?

(5) A No. I heard some of the discussion a (6) little earlier. Of course I am acquainted with the (7) MPAA approach. When you look at programming in terms (8) of its value to cable operators, which was what our (9) charge was was to do, it goes far beyond. Certainly (10) not related at all to hours. To just run hours of (11) programming, is no measure of value.

(12) There are many cable networks on today (13) that get such a small audience that you can't even (14) measure their audience or they might end up getting (15) one-tenth of one percent of the households that could (16) watch them to actually watch them. They might run 24 (17) hours a day.

(18) Well, you don't want to value that 24 (19) hours of programming on a channel that draws a (20) minuscule audience the same as you would value (21) programming that brings in an audience, not only a (22) larger audience, that is only one element. But an (23) audience that is involved, that is excited, that reads (24) about the very thing that is on that night. They read (25) about it in the newspaper during the day. There is a

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(1) pennant race or a league championship contest that is (2) going on that people are involved in on a continuing (3) basis.

(4) That is fundamentally different than other (5) kinds of television programming. We work with all of (6) those. But with sports, and we often get involved in (7) the valuation of sports. We help negotiate rights (8) deals for sports. We know quite clearly that the (9) component of value there is something that goes far (10) beyond both the hours and the viewing levels of (11) sports.

(12) Q In your prepared testimony, you compared (13) I think the results of your study that you did for the (14) 1989



proceeding and the 1992 proceeding. Is that (15) correct?

(16) **A That is correct.**

(17) Q And you appeared before the old tribunal (18) in the 1989 proceeding?

(19) **A Yes. I did.**

(20) Q I think you testified at that time about (21) the methodology involved there. So we're not going to (22) get into that today. I will be asking you about the (23) 1992 study methodology. (24) Before we go further though, can you just (25) summarize briefly your results? Let me hand you a

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(1) copy of your testimony and your study.

(2) In summary, what is it that you found? (3) Let's also use the summary chart, it's the first chart (4) of your results that appears in your study.

(5) **A I guess we can refer you to a page in the (6) report, which is page two, where these same numbers (7) appear. What is it that we found? First of all, in (8) the most general way, what we found is that sports was (9) the most valuable category of programming to cable (10) operators. (11) We found that the interest in sports has (12) increased when we compare 1989 to 1992, as you can see (13) from the chart, that there has been an increase in (14) sports. That is consistent with my experience in the (15) industry. I'll be happy to explain that to you during (16) my testimony.**

(17) **Specifically, what we found was that if we (18) were to ask cable operators how they would allocate a (19) fixed programming budget, what they would do is to (20) provide - and you know these numbers, we take it out (21) to a tenth of a percentage point, but I don't claim (22) that that measure is anywhere near that exact. Quite (23) clearly, more than a third of the allocation. Now we (24) are getting up to about 40 percent in 1992, close to (25) that 39 percent they would allocate of a fixed**

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(1) **programming budget to sports.**

(2) ARBITRATOR WERTHEIM: That is in response (3) to a hypothetical question about how you'd allocate (4) 100 dollars?

(5) THE WITNESS: No. It's not 100 dollars. (6) It's a fixed programming budget that they were asked (7) to allocate.

(8) ARBITRATOR WERTHEIM: A fixed budget of (9) what amount?

(10) THE WITNESS: It's a fixed programming (11) budget.

(12) ARBITRATOR WERTHEIM:

Whether it's large (13) or small, how we determine -

(14) THE WITNESS: Whatever it would be for (15) that system.

(16) ARBITRATOR WERTHEIM: Might it not have (17) been more informative to ask how much did you actually (18) allocate last year?

(19) THE WITNESS: Well they don't allocate (20) according to this. This is something that we have to (21) do, that you are charged with doing, is taking the (22) dollars that they pay in. They pay in the dollars (23) according to a formula, that as Dr. Lemieux has gone (24) through with you, that is related to the signals they (25) carry. But the allocation of those dollars is related

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(1) to the program categories.

(2) ARBITRATOR WERTHEIM: That's my point. (3) Why instead of having this hypothetical budget, why (4) not ask, tell us about your actual budget last year. (5) How much do you spend to importing distant signals, (6) and how do you break it down among these various (7) program categories?

Getting real life data from a (8) recent year, rather than hypothetical data.

(9) THE WITNESS: Well first of all, I think (10) that to tell them, to be able to give them a precise (11) number at the time that we call, which is right at the (12) end of the year, you would have to be able to include (13) their filings, both the -1 and the -2 filings for that (14) year to have that budget. That does not exist if we (15) are to conduct the study in a timely manner.

(16) We start the studies in December. They go (17) into the early spring. Well at that point, let's say (18) for 1992, the 92-2 dollars that they have to pay are (19) not available to us. So we wouldn't be able to do (20) that.

(21) ARBITRATOR WERTHEIM: You are assuming (22) that their only expense is the royalty payments.

(23) THE WITNESS: No. Their only expense in (24) terms of what? I'm not sure I understand that (25) question.

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(1) ARBITRATOR WERTHEIM: Well, whether they (2) report it to the copyright office or not, they've got (3) budgets. These are businesses. They have got all (4) kinds of records. Right?

(5) THE WITNESS: Right. But we don't have (6) them.

(7) ARBITRATOR WERTHEIM: And they have a (8) budget.

(9) THE WITNESS: Well, we don't have those.

(10) ARBITRATOR WERTHEIM: I

know. Why don't (11) you ask them to tell you what their budget was, and (12) how much of it went to these various categories?

(13) THE WITNESS: I think if we could rely (14) upon that and we felt that they would be able to pull (15) up that number in that category and have it clear for (16) that year, that wouldn't be a bad idea.

(17) But I don't think that we can rely on that (18) in a system that is probably residing - they went (19) through a budgeting process as they went into the year (20) generally. Just to tell them, they know that we are (21) talking about distant signals. So they understand the (22) portion of their budget that is being used. The (23) actual dollars that they have, I don't believe that we (24) could have with any kind of certainty. The question (25) then would be well how reliable is that, because you

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(1) don't know what those dollars are.

(2) So to take what we call a constant sum (3) approach, is what I think is the most effective, (4) because they do know what they are carrying, and now (5) they are allocating that among a number of different (6) services.

(7) BY MR. GERSCH:

(8) Q Mr. Bortz, I want to make sure that a (9) fundamental point is clear here. If you had a sample, (10) whatever a particular cable operator's actual, you had (11) full access to their internal documents, what you (12) could see there is how much they have spent on distant (13) signal programming. Is that right?

(14) **A That is correct.**

(15) Q What you could not see there is how they (16) would allocate it among these categories of (17) programming. They don't get a chance to do that.

(18) **A They don't get a chance to do that. The (19) question, I believe, was if you could have that number (20) for that system, would you then ask them to allocate (21) that number? I say if you could have that number (22) reliably and in a timely fashion, then that kind of a (23) methodology could be considered. But it is not (24) available in either a reliable or a timely fashion.**

(25) **With respect to the budgeting, with all**

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(1) **due respect, as you have seen here in the cable data (2) base that has been referred to, and you have seen some (3) differences between numbers that were in the base at (4)**

different points in time. Over the following year or (5) more of time after the period we're talking about, the (6) amounts change. I mean they go through the (7) calculation and maybe they don't do it right or they (8) reconsider what the base is, but that is a data base (9) that is in flux to a point of time far beyond when we (10) can appropriately conduct the survey.

(11) So that is why we go to the constant sum (12) survey, which I am prepared to go into in my (13) testimony. It is one that is commonly used in such (14) allocation processes, and is one that you can have a (15) high confidence in.

(16) ARBITRATOR WERTHEIM: Thank you.

(17) BY MR. GERSCH:

(18) Q Mr. Bortz, if you could just turn to pages (19) 10 and 11 of your testimony. I just want to walk (20) through some of the more salient of 10, top of 10, we (21) won't get into the chart, some of the more salient (22) features of your testimony here.

(23) In the beginning when cable first started, (24) what types of programming what carried on cable TV?

(25) A Cable started as a reception service.

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(1) That was people who could not get signals, television (2) signals. This new fangled medium in the 1950s. Cable (3) arose to bring those television signals into (4)

communities that were beyond a range. That is what (5) the business was for quite a period of time.

(6) Q And did that change at a certain point?

(7) A That then changed. What we saw in the (8) 1970s was that they were able to sell packages of (9) movies, what we call paid television, most notably (10) HBO, to sell those packages of movies to households. (11) Well that was something that then a (12) lightbulb went on saying gee, if we can provide (13) television programming beyond the signals that are (14) available over the air in a community, then maybe we (15) can take our business, which has been pretty much (16) confined to the rural areas of the U.S. and begin to (17) go after the big markets. We can't go into Chicago or (18) Denver or Washington, D.C. right now with just giving (19) them the signals they can get over the air. And by (20) the way, just having a movie service like Home Box (21) Office isn't going to

be enough.

(22) So what then happened was the development (23) of a number of basic cable channels and the bright (24) idea of Ted Turner to create a super station. Because (25) with the 1976 copyright decision, what hit him was he

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(1) could take this little independent station which (2) wasn't very successful in Atlanta, and although (3) there's this sort of myth that stations like that are (4) passive in their carriage, he encouraged its carriage (5) by a microwave carrier, at that point microwave and (6) then satellite, to take the signal around the U.S. and (7) to put something special on there that would be (8) something that you could sell in a big market.

(9) And then a number of other things were (10) started, ESPN, Cable News Network, a long list of (11) channels began to be created which allowed the cable (12) business to move from a pretty much mom and pop (13) business in rural areas into the big business that it (14) is today nationwide.

(15) Q Let's skip over the chart that's on 10 and (16) 11. But what I do want to ask you, Mr. Bortz, is I'd (17) like you to describe the types of programming that you (18) would have found on a typical cable system in the (19) 1990-92 period. If you could just write just like (20) categories, if you could write on that chart there.

(21) I take it one category of things would be (22) you'd get the same types of channels that you could (23) get over the air. Is that right?

(24) A First of all, let me make a real clear (25) distinction, because we work both in the cable

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(1) business and in the broadcast business. When I am (2) working with a broadcaster and I'm in a geographic (3) area, that broadcaster's concern is one channel, the (4) programming on that one channel. His revenues, his (5) business is derived from the success of that signal (6) channel.

(7) What I just described for a cable operator (8) is something that is a totally different business. (9) His success comes from putting together a package of (10) many, many channels, that will encourage people to (11) subscribe and to pay a monthly fee.

(12) So what we do is we totally

depart from a (13) broadcast mind of I want you to watch my channel, to (14) assembling a package. We talked a bit about what the (15) package would be.

(16) We started early on in the 1950s with (17) really sort of the local, I'll call it regional, (18) because you are taking things by microwave beyond the (19) local area, broadcast signals. Now what are those? (20) ABC, the network - these are affiliates, their (21) spaces. So we classically add ABC and CBS and NBC. (22) Fox is not maybe in legalistic terms called a network, (23) but for all practical purposes is a network, which CBS (24) learned when they lost the NFL to Fox in a bidding (25) war.

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(1) We have got independent stations that are (2) not affiliated. There are a couple of start-up (3) networks like Warners and UPN. They are tied into (4) some of these, but right now they do not program very (5) many hours.

(6) MR. LANE: Mr. Chairman, I am going to (7) object to the characterization of what is occurring (8) today. UPN and Warner Brothers Network, clearly the (9) NFL reference to Fox is clearly after 1990-92.

(10) I'll let this go. I don't mind the (11) testimony coming in at all, but the question was would (12) you please tell us about 1990 to 1992. I would ask (13) that you instruct the witness to confine his remarks (14) to that period, since you have ruled specifically that (15) that is what should be allowed in this proceeding.

(16) THE WITNESS: No problem.

(17) BY MR. GERSCH:

(18) Q Mr. Bortz, maybe I can ask a clarifying (19) question. The broadcast signals that you have listed (20) first on that chart, the local broadcast signals, (21) those are signals that were first put on cable in the (22) 1950s or when cable first started to be carrying, and (23) have stayed on the package into the 1990 and 1992 (24) period. Is that right?

(25) A That is correct. Obviously in the 1950s

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(1) we didn't have Fox. But in 1992, we certainly had (2) Fox.

(3) Q Okay. And then there came a time when in (4) addition to the local broadcast signals that cable (5) started carrying, you mentioned that they started (6) adding other kinds of programming, other kinds of (7) channels.

(8) A Yes. Let me though put on



here the non- (9) commercial channels.

(10) Q What would be an example of what you call (11) a non-commercial broadcast signal?

(12) **A Well it could be KCET, KRNA in Denver. (13) These are broadcast stations in a local area that (14) typically carry some programming from the Public (15) Broadcasting Service, but carry a variety of other (16) programming as well, non-commercial programming.**

(17) Q Okay. And then in terms of what other (18) types of programming or channels did cable operators (19) add, moving into the 1990-92 period?

(20) **A As I mentioned, we are not talking about (21) a single station here. The cable business is a (22) package. Let me talk from my own experience.**

(23) I am a subscriber in Denver. I am on a (24) system that in 1992 had activated something like 55 to (25) 60 channels. So obviously I am not going to list all

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(1) those here, but you can imagine that I've got an (2) extremely long list. This category fills just a part (3) of that.

(4) Then in addition to that, I carry certain (5) what are called access channels. Those access (6) channels are typically mandated by a franchising (7) authority, saying we want you to provide some channels (8) so they can be programmed by the schools, by (9) government. (10) ARBITRATOR WERTHEIM: You are now speaking (11) of cable channels rather than broadcast signals?

(12) THE WITNESS: Yes. Those are cable (13) channels. You will find also in this initial package, (14) distant signals, which they are bringing in. (15) Typically on a cable system, you will find a couple of (16) them. I don't know, I think the average Mr. Lemieux (17) came up with was 2.2 or a number something like that. (18) But distant signal carriage will be there.

(19) That is a broadcast station that they (20) bring in from a distant location that the government (21) specifies what they pay for. There's no marketplace (22) handshake there other than an agreement with whomever (23) is delivering the signal, the so-called microwave or (24) satellite carrier, as to what you pay in order to get (25) that.

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(1) Then you have a whole host of basic (2) channels, basic cable channels.

Now these are (3) fundamentally different.

(4) They are not signals. These are all (5) signals. These have a broadcast station, a (6) transmitter, a tower and it goes out. Now it may get (7) to the cable system in a different way.

(8) A basic cable channel is not broadcast (9) anywhere. Delivered by satellite typically. There's (10) a whole array you go through. But you have probably (11) heard them. If you are a cable subscriber you are (12) familiar with them. But it could be an ESPN, a TNT, (13) a USA Network. It could be a regional sports channel, (14) Lifetime and Arts and Entertainment, the Outdoor (15) Channel has now been launched, the Weather Channel, (16) the Travel Channel and so forth.

(17) The idea being again, a big package. So (18) the basic cable channels would be the next category. (19) Then you have pay services.

These are (20) somewhat different because what I will do typically is (21) that we might put a price tag on this package. That (22) will be called basic service. But you know very few (23) subscribers just take basic, which is the channels (24) they can get over the air and a couple super stations. (25) They move down, and that's not a mistake, it's the way

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(1) that they package these to make it very attractive. (2) Most subscribers take the full basic plus what we call (3) expanded basic.

(4) That may have 30 or 40 channels, basic (5) cable channels in addition to this. This is what they (6) buy. Then they have some options. They can buy a pay (7) service that could be an HBO or Showtime. Those are (8) what we call full pay services. There's something (9) called mini-pay services, which are yet more movies, (10) but they are very low priced with labels like Encore, (11) Stars. And they can get into pay per view. That say (12) that whether it's a movie, a concert, a fight, that (13) you pay for that event, not a monthly fee.

(14) These pay services you have a basic (15) monthly fee that you pay. Then if you opt to take a (16) movie service, a full pay service or one of the mini (17) ones, you pay another monthly fee. Then for pay per (18) view, typically you pay per event, per event that you (19) view.

(20) BY MR. GERSCH:

(21) Q You mentioned that most of the subscribers (22) take what is called expanded basic. That is a number (23)

in excess of 90 percent of subscribers. (24) **A Well in excess of 90 percent in virtually (25) every system that I am acquainted with.**

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(1) Q Let's talk just a little bit while you are (2) still up there about how cable operators derive (3) revenue in connection with these categories of (4) programming. Let's start with pay per view. That may (5) be the most straight forward.

(6) **A This is real direct. Let's say I'm a (7) cable operator. I'm going to sell movies, \$3.95. You (8) want the movie, I'm going to get \$3.95 in revenue. (9) Half of that will probably go to the company that (10) provides those movies to me, and then they take a (11) distribution cut. Then it goes back essentially to (12) the owner of the movie rights.**

(13) But as a cable operator of that roughly (14) four dollars, that is two dollars I get to keep. I've (15) got a two dollar expense against the two dollars made. (16) So that is direct, very countable.

(17) Pay services also is direct. HBO is \$8.95 (18) or \$10.95. The system has a deal with the provider of (19) that service that might get four dollars out of it, or (20) five dollars out of it, and the system keeps the rest. (21) So both pay per view and pay services are very direct. (22) I have this programming, I've got this stream of (23) revenue.

(24) Q So that is very different than say the (25) traditional broadcast, the way a broadcast station

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(1) would calculate its revenues.

(2) **A Absolutely. Broadcast stations not (3) subscription, it's free. Its revenues come solely (4) from advertising. As I say, that broadcast station is (5) interested in selling just that station. They want (6) people to view that station.**

(7) **A cable operator is very very sensitive to (8) the interaction among these categories. For example, (9) you don't want to price this so high that it cuts too (10) much into pay revenue.**

(11) **What you are trying to do is maximize (12) revenues as any good business person would do. So (13) they carefully look at these different levels of fees (14) that they charge and come up with maximizing revenues. (15) That is one of the reasons that they paid us for years (16) to do the cable operating performance benchmark study, (17)**

and provided us with system data because they wanted (18) to see who was doing best with various pricing (19) schemes, so that they could essentially get best (20) practice. (21) Q You talked about how they get revenue from (22) a pay per view, where they get a direct stream of (23) revenue. How does the cable operator get a benefit (24) from carrying the basic cable networks, the Showtimes (25) - I'm sorry, not Showtime, but Bravo or ESPN?

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(1) A With that they have a cost, a license fee (2) that they pay that they negotiate for in the (3) marketplace with the provider of the service. That (4) can be a very protracted and tough negotiation, but (5) it's a pure marketplace negotiation. They pay a fee.

(6) Now how do they get revenue? They get (7) revenue, some of it, from some of those stations (8) because they will sell advertising on it. They get (9) about two minutes an hour typically on a cable (10) channel. But at this point it's still not a big deal.

(11) It's maybe five percent, the advertising sales are (12) maybe five percent of the revenues of the cable (13) system, typically.

(14) So it's there. It's not something you (15) want to sneeze at, but that's not it primarily.

(16) Where they mainly get the revenue is from (17) a subscriber paying 22 dollars or 25 dollars a month (18) to take the whole package. So what they have to do in (19) assembling the package is to say I've only got a (20) certain number of channels.

(21) Let's say I've got a 54 channel system. (22) I've only got 54 channels. I have got 100 programming (23) services that I can choose from. I have got to put (24) together that right mix that will convince the largest (25) number of subscribers to give me 25 dollars a month.

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(1) And I want to have the programming that (2) will keep the subscribers on, because one of the big (3) costs in the cable business is that about 30 percent (4) of cable subscribers turn over every year. They (5) disconnect. So just to stay even, you've got to (6) recreate 30 percent of your customer base every year. (7) Some of that is because people move, and some of it is (8) because they are dissatisfied.

(9) So when they look at this and they say (10) what do we carry, they have to say I want to sell that (11) 25 dollar package. Now I want to put some elements in (12) there that will allow me to attract subscribers and to (13) retain them. So that's what they do when they look at (14) it. Distant signals obviously plays a very important (15) part in that. There is a difference.

(16) In a distant signal, they can't sell any (17) advertising. They are not allowed to. So that extra (18) revenue that they get from selling spots say in an NFL (19) game on TNT, and they can develop revenue for the (20) system, they can't develop any revenue for the distant (21) signal. So the distant signal is really one of the (22) purest forms of something that you carry because you (23) want to attract subscribers, you want to retain (24) subscribers and develop that basic revenue out of the (25) 20 or 25 dollar a month.

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(1) Q The job of the panel here now is to (2) determine what value the operators would put on the (3) various types of programming that go on distant (4) signals. I want to turn now to how you went about (5) doing that, and how you constructed your survey. We (6) could use this next chart to illustrate some of the (7) steps involved.

(8) (No response.)

(9) ARBITRATOR WERTHEIM: Before you go into (10) that let me ask you a question. This relates to (11) something that I think the tribunal mentioned in an (12) earlier determination. Your approach is to determine (13) the value that the cable operator would place on (14) various types of programming.

How do you determine (15) the approach of the other side of the bargaining (16) table, who is selling these types of programming? (17) Have you looked at that at all? The negotiation, if (18) that's what we are trying to simulate, has got at (19) least two sides to the table.

(20) THE WITNESS: That's right. If you (21) consider the suppliers of the program, for example, (22) they would in sports demand an extremely high price. (23) There's ample evidence of that.

(24) Among my clients are -

(25) ARBITRATOR WERTHEIM: It's in their

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(1) interest to persuade us that the cable operators are (2) willing to pay a very high price. So who are we (3)

hearing from to tell us the other side of the tables?

(4) THE WITNESS: Well, you are hearing from (5) the cable operators, not from the sports people. What (6) I am saying is that those who are selling sports (7) rights would hold them dearly and find any kind of (8) compensation that comes through this kind of process (9) small compared to the compensation that they get when (10) they go out into the marketplace. (11) I work with the National Basketball (12) Association. I work with the National Hockey League. (13) We have worked with major league baseball. I have (14) worked with a number of professional sports franchises (15) on the negotiation of sports rights. I can tell you (16) that the level of copyright revenues that are derived (17) are tiny compared to what they could get if they went (18) out into the marketplace.

(19) That is why the leagues are not real (20) thrilled with super stations, because they know that (21) those are games going into the national marketplace, (22) and the compensation that comes back is far below (23) marketplace value. There are a number of measures of (24) that that could be looked at.

(25) ARBITRATOR WERTHEIM: We really don't have

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(1) much of an idea what the market would be like in the (2) absence of compulsory licensing, do we? I mean we (3) hear a lot of analysis, suppose the market were pretty (4) much the way it is now in these rates that are (5) negotiated. But in the absence of compulsory (6) licensing, the market place might look quite (7) different, might it not?

(8) THE WITNESS: Well I think we do have (9) ample evidence of that. Let's consider a basketball (10) game on a super station. That's taken into a national (11) marketplace and goes to 60 million households plus, as (12) we are looking at TBS in 1992 or if you look at WGN. (13) I don't remember the exact number, but on the order of (14) 30 million cable households.

(15) We know what the NBA was able to get in (16) the marketplace from Turner Broadcasting, to do the (17) same thing. To take that game to national cable (18) households, same kind of circulation as TBS. We know (19) what they were willing to pay. What they were willing (20) to pay is a very large number, quite unrelated to the (21) kinds of revenues that are being generated out of (22) copyright

payments, far beyond that.

(23) So I think that we do have ample evidence. (24) I am not prepared to testify to that here. But in my (25) experience and in assisting the leagues, I know very

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(1) well that the marketplace value in the cable national (2) marketplace is far above anything that we have ever (3) seen developed out of this process.

(4) ARBITRATOR WERTHEIM: The amount of money (5) available to pay royalties might be substantially (6) higher too. Now it's limited by the compulsory (7) license fee. But in a free market, there would be no (8) limitation.

(9) THE WITNESS: That's right.

(10) ARBITRATOR WERTHEIM: That might result in (11) quite a lot of changes in appearance of the market (12) from what we're looking at here.

(13) THE WITNESS: So we're looking for what is (14) the best way, since we don't have a free market, and (15) that's the situation that we are presented with. Is (16) a copyright law in place and a compulsory license in (17) place that says there isn't a free market. So how can (18) we best determine how a cable operator would in fact (19) allocate those.

(20) What I can say is what you are talking (21) about is the size of the pie. I would agree with you, (22) that if we did not have a copyright law that the size (23) of the pie would change. But we have a certain sized (24) pie in 1992. That is fixed. We don't have a (25) marketplace to set that, but at least what we can do

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(1) is to say how would the buyer divide that pie in 1992. (2) That is I believe the process that we're all left with (3) here, because we aren't left with a free market.

(4) ARBITRATOR WERTHEIM: So we're not really (5) simulating the free market negotiation. We are (6) simulating a negotiation as though all these parties (7) had to sit down with each other and divide up this (8) fixed pie.

(9) THE WITNESS: Well the price was set. The (10) price was set by the formulas that are in the forms. (11) So that part of the negotiation was already over.

(12) ARBITRATOR WERTHEIM: So it would not be (13) quite accurate to say we are really simulating the (14) negotiated copyright fees in a free market. What we (15) are trying to simulate is what everybody would

agree (16) to if they didn't have this panel and they were (17) dividing up this fund.

(18) THE WITNESS: What we are simulating is (19) what the buyer of the product, the buyer of the (20) product is the cable system that makes a conscious (21) decision to carry or not carry a distant signal, (22) knowing that that carries a cost with it. (23) So in this process, the price was set. (24) The buyer has paid the price. Now the question then (25) is what is the buyer's view as to the relative value

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(1) of what they bought. So yes, if the seller comes in, (2) that could effect the price, but that is not the (3) process we have. The price is fixed. Now we are – (4) I think it's appropriate to say at that point, how (5) would the buyer allocate those dollars if they (6) consciously decided to pay in. That is what this (7) process is addressed to. There is no other way to (8) address that process once the pie is fixed.

(9) ARBITRATOR WERTHEIM: I think you can view (10) it the other way around. The price has been set. The (11) question is how do the sellers allocate it among (12) themselves.

What they think the buyer would have done (13) may be a good way of arguing that, but ultimately, (14) it's –

(15) THE WITNESS: All of the sellers would (16) assume that they should get a whole pie. I mean, in (17) this kind of a process.

(18) ARBITRATOR WERTHEIM: That's why we're (19) here.

(20) THE WITNESS: So I think that the best (21) measure is to talk to someone who – these operators (22) have no stake in what they tell us here. It is not (23) like they are seeking it all. These operators are (24) saying I made a conscious decision to buy something. (25) What is the relative value of the program categories

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(1) in what I bought. What they tell us does not affect (2) their pocketbooks a bit.

(3) So to me, this is by far the most (4) objective measure. To go to say how many hours of (5) programming, I think I have illustrated that hours is (6) basically a meaningless measure in my opinion.

(7) Looking at the levels of viewing, that is (8) great for a broadcaster who is selling advertising. (9) But levels of viewing is not a measure of value in (10) that package of cable programming that is designed to (11) attract and retain subscribers to pay a monthly fee.

(12) So if you begin – we had addressed this (13) back 10 years ago in 1985 when we were first (14) approached to look at this. They said to us, what's (15) the best way to do this. How do we allocate this?

(16) I think we all agree, you can't just say, (17) "Tell me, seller, what you'd sell it for." I'll give (18) you a number, a big number. Because we know that each (19) of the major league sports develops television (20) revenues far in excess of the total copyright pool (21) each year. So we know that's gone. I'm sure the (22) movie people could come up with as dramatic a set of (23) numbers.

(24) So if we can't do that, what do we do? (25) What do we do is we go to the buyer, and we say, "How

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(1) do you divide it?" Because they do not have a stake (2) in it, no stake at all. They are as objective and as (3) expert a group as you could find, because they know (4) what their subscribers want.

(5) They are marketing to them all the time. (6) They are replacing 30 percent of that base every year. (7) They are in tune with the subscribers. They know what (8) kind of package they need and how valuable the (9) elements are of that package to get their subscribers. (10) So to us, we started with that's where (11) you've got to go. Then it was a question of (12) methodology, how to best elicit those opinions in the (13) most precise way.

(14) CHAIRPERSON JIGANTI: I think maybe this (15) would be a good time to take a break. We'll take a (16) little longer break than usual. Take a 15 minute (17) break.

(18) (Whereupon, from 3:08 p.m. until 3:29 p.m. (19) the proceedings went off the record.)

(20) CHAIRPERSON JIGANTI: Would you mind if we (21) went back to grammar school with the witness, and if (22) I ask a few questions?

(23) MR. GERSCH: Certainly. Please.

(24) CHAIRPERSON JIGANTI: As you can tell, we (25) took a break a little bit early because I thought

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(1) there was some communication problems. I'm going to (2) try and work out a communication problem.

(3) Mr. Bortz, I have some fundamental (4) statements and questions. Is this correct that first (5) of all, we were talking about a system which would be (6) cable as opposed to a station, which would be TV?

(7) THE WITNESS: Yes. That's

correct.

(8) CHAIRPERSON JIGANTI: Okay. We were (9) advised of that the other day, which was a very big (10) help. Thanks to counsel here.

(11) Now the only time there are negotiations (12) for services would be between a local system and a (13) cable network?

(14) THE WITNESS: Correct.

(15) CHAIRPERSON JIGANTI: How would one of (16) those cable networks, I'm going to stay away from (17) Turner because he sort of confounds things, because (18) he's into defense and everywhere in the present. No (19) offense, but every time you talk about there's a (20) special rule or something. I don't want to get (21) involved in that.

(22) Is A&E part of the Turner?

(23) THE WITNESS: No.

(24) CHAIRPERSON JIGANTI: Now A&E is what? A (25) group of people who have access to -

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(1) THE WITNESS: Arts and Entertainment, A&E, (2) is a cable channel. That's a channel owned jointly by (3) three companies which happens to include ABC, Hearst (4) and NBC. They, that channel then, it's a separate (5) company. It goes out and it assembles programming, (6) buys that programming or produces that programming, (7) leases time on a satellite transformer.

(8) CHAIRPERSON JIGANTI: I don't mean to (9) interrupt you, but -

(10) THE WITNESS: That's fine.

(11) CHAIRPERSON JIGANTI: We had a discussion (12) on this. I know the way we went through it and what (13) our discussions were. It would be helpful, I think, (14) if I developed it further.

(15) THE WITNESS: Please.

(16) CHAIRPERSON JIGANTI: You answered a (17) significant question. A&E is actually a cable (18) channel.

(19) THE WITNESS: It is a cable channel.

(20) CHAIRPERSON JIGANTI: It is a cable (21) channel, but they became aggressive, as you said (22) somewhere in the thing, when the cable industry (23) decided to become aggressive and not merely passive.

(24) They went out and they made contracts with (25) a lot of people to provide a package so that they

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(1) could go to a system and tell that system that if you (2) carry our channel, we will provide this service. In (3) return, we want this amount of money.

(4) THE WITNESS: That is correct.

We want (5) this amount of money, but by the way, we'll give you (6) two minutes an hour of advertising that you can sell (7) yourselves.

(8) CHAIRPERSON JIGANTI: That's a little bit (9) of a refinement.

I understand what you mean. We (10) talked about it. There's a term for it that was used (11) here yesterday. I was thinking in terms of a - what (12) is the term?

(13) MR. LANE: Local avail.

(14) CHAIRPERSON JIGANTI: Local avail. I know (15) they are local avails. We talked about the packaging (16) of the Turner things and the fact that they could give (17) you four channels and all that sort of stuff, and (18) there were local avails in that. But I think that (19) confuses the concept that I think we are trying to (20) deal with.

(21) The other aspect of this is, you can take (22) -

(23) ARBITRATOR WERTHEIM: Can I get back there (24) before you go?

(25) CHAIRPERSON JIGANTI: Sure.

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(1) ARBITRATOR WERTHEIM: Cable channel, does (2) that mean there's a channel numbered 10 or whatever it (3) is in a certain city where this originates?

(4) THE WITNESS: No. The other term that is (5) used and is probably better is a cable network. A (6) cable network really conveys the fact that at some (7) point nationally, a stream of programming is put (8) together and then goes out to cable systems. The (9) cable system decides what channel they put it on. It (10) is always labeled Arts and Entertainment.

(11) ARBITRATOR WERTHEIM: So in effect they (12) are a wholesaler of a package of programs?

(13) THE WITNESS: In a sense, they are a (14) wholesaler of a package of programming to the cable (15) operators. So it might -

(16) ARBITRATOR WERTHEIM: Some of that (17) programming they might create themselves. Most of it (18) they probably buy from somebody else?

(19) THE WITNESS: It is a mix. As they have (20) gotten more successful financially, they have begun to (21) do a little more of their own programming.

(22) Originally, they just bought programming.

(23) Just an anecdote to show you how you (24) instantly had a channel. When Arts and Entertainment (25) first started in the early 1980s, it was called just

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(1) Arts at that point. There were not many cable (2) subscribers and you couldn't get much of a fee. So (3) they

couldn't afford to buy a lot of programming, so (4) they went over to Europe, which had a lot of (5) government broadcasters. They bought all kinds of (6) cultural programming, ballet and symphonies. Deadly (7) dull, but they got up, they got onto the cable systems (8) by negotiating deals, only getting a few cents a month (9) at that point, and established their cable network.

(10) ARBITRATOR WERTHEIM: No royalties are (11) paid on these, because they are negotiated directly (12) with the cable network?

(13) THE WITNESS: Exactly. The cable operator (14) pays a license fee to the network. The network (15) negotiates its deals directly with the program (16) providers.

(17) CHAIRPERSON JIGANTI: So we talked about (18) cable network and cable system. Now I'd like to talk (19) about a cable system and cable station, TV station.

(20) THE WITNESS: Yes.

(21) CHAIRPERSON JIGANTI: The TV station would (22) do two things, such as WGN. If you are within their (23) area, you can pick off what they have.

(24) THE WITNESS: Yes.

(25) CHAIRPERSON JIGANTI: And just broadcast

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(1) it.

(2) THE WITNESS: That is correct.

(3) CHAIRPERSON JIGANTI: And if you are (4) beyond their service area and you as a cable system (5) pick that station up, then you have to pay a (6) compulsory license because it's beyond the service (7) area.

(8) THE WITNESS: Correct, beyond the 35 (9) miles.

(10) CHAIRPERSON JIGANTI: And for the super (11) stations within the area, we can pick it up. If it (12) goes distance, we can still pick it up.

(13) THE WITNESS: You can pick it up only if (14) you get it through a cable system or maybe have your (15) own satellite dish to receive it.

(16) CHAIRPERSON JIGANTI: If the cable system (17) wouldn't pay anything for it?

(18) THE WITNESS: A superstation, the -

(19) CHAIRPERSON JIGANTI: No, no, no. For a (20) network station.

(21) THE WITNESS: For a network station?

(22) CHAIRPERSON JIGANTI: Yes. For a network (23) TV station.

(24) THE WITNESS: A distant, they are counted (25) as one-quarter of a distant signal equipment.

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(1) CHAIRPERSON JIGANTI: What about the (2) relationship? This confounds the thinking about the (3) problem.

(4) THE WITNESS: Sure.

(5) CHAIRPERSON JIGANTI: I am talking about (6) the relationship between the programmer and a cable (7) system dealing with an independent cable station - I (8) mean independent TV station such as WGN. There is no (9) relationship.

(10) THE WITNESS: There is no relationship at (11) all.

(12) CHAIRPERSON JIGANTI: Now what about with (13) the network TV stations, CBS and the rest of those (14) things? Still no relationship?

(15) THE WITNESS: The network affiliated (16) station, that would be - there would be no (17) relationship with the cable system.

(18) CHAIRPERSON JIGANTI: And as you go (19) beyond, the 35 miles beyond, the distance of the TV (20) station, you pay a compulsory license for the (21) independents? You pay nothing for the network (22) stations?

(23) THE WITNESS: Nothing for the network (24) programming on the network station. Let's talk about (25) the network. Do you understand that distinction?

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(1) CHAIRPERSON JIGANTI: Not the independent (2) programming. I don't want to cut the NAB out here.

(3) THE WITNESS: Okay.

(4) CHAIRPERSON JIGANTI: I think that will (5) confuse things if we get into it at this stage.

(6) But those are the basic concepts and those (7) concepts are enunciated here. I hope that they are (8) clear.

(9) THE WITNESS: Yes, as you've expressed (10) them.

(11) CHAIRPERSON JIGANTI: As we address those (12) concepts, it's going to be easier. And I don't mean (13) to -

(14) ARBITRATOR FARMKIDES: No. It's helpful.

(15) ARBITRATOR FARMKIDES: Yes. I want to (16) jump in.

(17) CHAIRPERSON JIGANTI: I'm very intrusive (18) with my colleagues here.

(19) THE WITNESS: That's fine.

(20) ARBITRATOR FARMKIDES: Now we're (21) beginning to work together. I think that's very (22) healthy.

(23) May I state it a little differently?

(24) THE WITNESS: Sure.

(25) ARBITRATOR FARMKIDES: I am Media

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(1) General. I'm a little cable system in

Virginia.

(2) THE WITNESS: Yes.

(3) ARBITRATOR FARMKIDES: I am required by (4) law to broadcast all of the Washington, D.C. local (5) stations.

(6) THE WITNESS: Yes.

(7) ARBITRATOR FARMKIDES: In addition, as (8) the entrepreneur that I am, I want to pick up as much (9) as I can to enhance my system at the least possible (10) cost.

(11) THE WITNESS: Yes.

(12) ARBITRATOR FARMKIDES: So I'm going to (13) get two superstations: WGN and WTBS. I will, (14) therefore, be required to pay the basic royalty, (15) copyright royalty, which I will do. And because I've (16) paid for that basic royalty, I will then have access (17) to those two superstations, then making an arrangement (18) with a contractor.

(19) THE WITNESS: Correct.

(20) ARBITRATOR FARMKIDES: Okay?

(21) THE WITNESS: Yes.

(22) ARBITRATOR FARMKIDES: Once I have those (23) two, I have everything which they have.

(24) THE WITNESS: Yes, you have your full -

(25) ARBITRATOR FARMKIDES: And I pay nothing

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(1) more.

(2) THE WITNESS: You pay nothing more, and (3) you have a rate that was set by law.

(4) ARBITRATOR FARMKIDES: If I want anything (5) more, like ESPN, A&E, and everything else, -

(6) THE WITNESS: Yes, sir.

(7) ARBITRATOR FARMKIDES: - I must pay an (8) additional copyright law, but because of the signals, (9) the additional signals, that I'm getting.

(10) THE WITNESS: No. If you get the cable (11) networks, they're not broadcast over a FCC-licensed (12) broadcast station. Let's say you get an Arts and (13) Entertainment.

(14) ARBITRATOR FARMKIDES: Oh, so I don't (15) have to pay the 3.75?

(16) THE WITNESS: You don't pay anything under (17) the copyright.

(18) ARBITRATOR FARMKIDES: I simply contract (19) with that individual?

(20) THE WITNESS: You make a - you sit down (21) and you negotiate.

(22) ARBITRATOR FARMKIDES: Okay. Yes.

(23) CHAIRPERSON JIGANTI: And in what we were (24) talking about, that would be cable. In the terms of (25) what we were talking about, it would be cable network

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(1) to cable system?

(2) THE WITNESS: Cable network to cable (3) system.

(4) CHAIRPERSON JIGANTI: Which is (5) negotiation?

(6) THE WITNESS: That's a negotiation.

(7) ARBITRATOR FARMKIDES: Let me ask: What (8) if ESPN broadcasts, a broadcast signal comes out from (9) someplace? Does that change the situation?

(10) THE WITNESS: Well, first of all, yeah. (11) I think that the head of ESPN, who is -

(12) ARBITRATOR FARMKIDES: Would have a real (13) problem.

(14) THE WITNESS: - a friend, he would be out (15) of a job because for -

(16) ARBITRATOR FARMKIDES: Okay. I think I (17) understand.

(18) THE WITNESS: I heard something like (19) anywhere from 4 cents to 13 cents a month. They sell (20) it for a lot more than that in the negotiation. I (21) mean, it's instructive.

(22) CHAIRPERSON JIGANTI: And ESPN is the same (23) as A&E?

(24) THE WITNESS: Yes.

(25) CHAIRPERSON JIGANTI: It's a cable

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(1) network.

(2) THE WITNESS: And what they negotiated (3) with a cable operator in the marketplace is a monthly (4) fee far in excess of what they would pay if it was (5) under the basic cable copyright fee.

(6) ARBITRATOR FARMKIDES: So if I contract (7) with ESPN or with A&E, I need not pay a royalty?

(8) THE WITNESS: You pay no royalty.

(9) ARBITRATOR FARMKIDES: It is just that (10) contract that governs our ability to pick up your (11) signal?

(12) THE WITNESS: Absolutely. And they, in (13) turn, had negotiated for the rights to the programming (14) that they're carrying, paying what the marketplace (15) negotiation was for the rights to have Major League (16) baseball or the rights to have NFL football. And they (17) negotiated that, saying, "You know, we're going to (18) take you nationally." And so the negotiation was (19) between the program provider and the cable network.

(20) And the broadcast station, let's take (21) basketball as an example. Basketball owns the (22) copyright. The league owns the copyright to all NBA (23) games. But a local team that



happens to make a local (24) deal to put its games on the station, which it has the (25) right to do within a 75-mile radius, loses total

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(1) control over where that signal goes from there.

(2) In other words, they make a local deal, (3) "I'm going to sell you the rights to broadcast on your (4) station." Oops. Shows up on the other side of the (5) country. They don't have any way to get compensated (6) for that other than back through this process.

(7) ARBITRATOR WERTHEIM: I'm looking at this (8) sweeps TV Week for the District of Columbia. And (9) there is a page in which they list the District cable (10) channel chart besides all the local stations, (11) Baltimore stations, Northern Virginia.

(12) CHAIRPERSON JIGANTI: This is the Panel's (13) Exhibit Number 1, - (14) (Laughter.)

(15) ARBITRATOR WERTHEIM: They list what are (16) called -

(17) CHAIRPERSON JIGANTI: - admitted into (18) evidence.

(19) ARBITRATOR WERTHEIM: - basic cable (20) channels. And there are roughly 30 of them. And, as (21) I look at the list, they include both superstations (22) and probably what you have called cable network.

(23) THE WITNESS: Yes.

(24) ARBITRATOR WERTHEIM: Now, this is one (25) local system that is carrying 30 different networks,

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(1) superstations, and the like, everything from American (2) Movie Classics to WWOR.

(3) THE WITNESS: And, just by way of (4) information, they probably are carrying more than (5) that. There are only 30 that are listed. Some don't (6) make -

(7) ARBITRATOR WERTHEIM: Well, then they have (8) premium channels and Pay-Per-View, and local (9) government, et cetera. But every one of these listed (10) under basic cable channels that happens to be a cable (11) network, so they refer to it as a channel, that's (12) carried at a price negotiated between a local cable (13) system and that network?

(14) THE WITNESS: Yes, everything but the (15) distant signals -

(16) ARBITRATOR WERTHEIM: Right.

(17) THE WITNESS: - has a negotiated price.

(18) ARBITRATOR WERTHEIM: Okay. And there's (19) no royalty payment on any of those cable network (20) programs?

(21) THE WITNESS: No, none at all.

(22) ARBITRATOR WERTHEIM: Now, in fact, (23) District Cablevision is owned by or in part by a much (24) larger Cablevision entity that owns lots and lots of (25) different systems across the country?

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(1) THE WITNESS: That's correct.

(2) ARBITRATOR WERTHEIM: Isn't it likely that (3) somebody from headquarters, not the local Washington (4) guy, is going to do these negotiations because he can (5) get a better deal because he's got all of these (6) different systems all over the country?

(7) THE WITNESS: Sometimes you will have (8) negotiations that are done by the large system (9) operators. In this case we're talking about TCI, (10) which is the largest system operator.

(11) ARBITRATOR WERTHEIM: So the relationships (12) among the different networks, some of whom are owned (13) by the same person or groups of persons?

(14) THE WITNESS: But there's another step. (15) The large system operator in the term that we use - (16) I hate to burden you with it - MSO. Okay? The (17) multiple system operator -

(18) CHAIRPERSON JIGANTI: Are you surprised we (19) knew one of them?

(20) (Laughter.)

(21) THE WITNESS: - might very well negotiate (22) a deal for carriage, "If you're going to get carried (23) on our systems, this is what we'll pay." The decision (24) to carry or not carry that in many cases, I would say (25) in most cases, beyond some minimal level that they

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(1) might guarantee, say, to a new channel, the decision (2) ultimately is going to be with that system.

(3) And let's say it's a 54-channel system and (4) they're carrying 54 channels and there are 50 other (5) ones out there that want to get on. If a system (6) manager or it might be the District manager in that area, (7) a combination of a handful of systems, if they decide, (8) you know, "We really need to carry this channel and (9) this channel. And we want it in Washington, D.C., but (10) it's not really going to do well in Phoenix," they'll (11) make that decision at the system level," it could be (12) that some of the negotiations, certain level of the (13) negotiations, that was done at the multiple system (14) operator level, but the ultimate decision "Do we carry (15) it or opt not

to carry it?" is at the system level.

(16) An example in Denver was that they used to (17) carry WWOR. When 3.75 came in, if I recall correctly, (18) they decided they didn't want to make that, get into (19) that point where they're making that payment. And (20) they dropped down to WGN and WTBS. That decision was (21) made at the system level, not made in the offices of (22) a multiple system operator.

(23) ARBITRATOR WERTHEIM: I'm sure that varies (24) a lot from one system to another.

(25) THE WITNESS: Sure.

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(1) ARBITRATOR WERTHEIM: But if you looked at (2) the other side of that table, some of these cable (3) networks are also more than ones owned by the same (4) person.

(5) THE WITNESS: Yes, sir.

(6) ARBITRATOR WERTHEIM: Whether it's Mr. (7) Turner or somebody else, aren't they in a position to (8) say, "Look, we'll give you a special deal if you take (9) all four of our networks or three of them plus TBS?"

(10) THE WITNESS: Turner has honed that to a (11) fine art. Turner certainly does it.

(12) ARBITRATOR WERTHEIM: But what you don't (13) get in any of these negotiations is any allocation (14) among sports, movies, syndicated, devotional, (15) whatever?

(16) THE WITNESS: Not unless you had -

(17) ARBITRATOR WERTHEIM: What you do is you (18) buy somebody's package in which those things are (19) already put together?

(20) THE WITNESS: Well, yes, although there (21) are some channels that you can look at and say, "Well, (22) this is a movie channel," like American Movie (23) Classics, "This is a sports channel," ESPN. So in the (24) what we call the truly vertical channels, CNN for (25) news, you are then making a decision by a program

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(1) category.

(2) But many of the most popular channels (3) combine programming, as we have with the most popular (4) distant signals. There are movies and sports and (5) syndicated and -

(6) ARBITRATOR WERTHEIM: But even when you do (7) have a negotiation with a cable system, unless it's (8) one of those vertical ones, you're negotiating a price (9) for a whole package of things, not any separate price (10) for sports, movies -

(11) THE WITNESS: Right. So the way

to – say (12) "Okay. Well, if our problem here is what's the value (13) of a certain type of programming on that mixed (14) channel, you agreed as a system to carry that channel (15) and pay a certain license fee on it." (16) Now, the best thing to do would be to ask (17) the operator of that system how they would divide that (18) value out. What percentage would they allocate among (19) these different program categories?

(20) CHAIRPERSON JIGANTI: That's your study?

(21) THE WITNESS: And that's why we decided to (22) go with this methodology in this study because we felt (23) it was the best way to address it.

(24) Now, when I was in Washington, to show you (25) the kind of influence I had in government, in 1979,

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(1) shortly after the copyright law, I took a very (2) aggressive position, saying that we shouldn't have (3) this process at all, in fact, let's get away from this (4) compulsory license. Now we're 15 years later. So you (5) see how influential I was. I didn't get anywhere (6) because of problems like this.

(7) ARBITRATOR FARMAKIDES: Can I finish up? (8) Are you finished?

(9) ARBITRATOR WERTHEIM: On that subject, (10) yes.

(11) ARBITRATOR FARMAKIDES: I just have one (12) final question. I'm clear on that now. If I'm the (13) same Media General over here in McLean, Virginia and (14) I want to keep everything as inexpensive as possible (15) for my subscribers and for myself, forget negotiating (16) with any cable network. (17) I'm able, then, to take the two (18) superstations plus all of the other superstations and (19) pay the royalty fee into the copyright office. Now, (20) at that same time that I've done that, I've committed (21) myself to pay a considerable amount of money because (22) of the 3.75 and so on.

(23) Do you see any other proscripton that (24) would sway me from doing that other than the money?

(25) THE WITNESS: Sure.

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(1) ARBITRATOR FARMAKIDES: What?

(2) THE WITNESS: You wouldn't be able to get (3) enough subscribers because if what you're – if all (4) that you're carrying are superstations, you don't have (5) that variety of programming in a package –

(6) ARBITRATOR FARMAKIDES: Okay.

(7) THE WITNESS: – that they're looking for. (8) Lifetime is a channel that is programmed to appeal (9) primarily to women. There's no superstation that does (10) that. Arts and Entertainment is primarily cultural. (11) There's no superstation that does that.

(12) ARBITRATOR FARMAKIDES: Those are all (13) networks.

(14) THE WITNESS: Those are all cable (15) networks.

(16) ARBITRATOR FARMAKIDES: Yes.

(17) THE WITNESS: So as a cable operator, your (18) decision would be very often, and I think the numbers (19) support that most frequently the decision is, I'm (20) going to get those two signals, which are dirt cheap (21) compared to what I would have to pay anyway. Guess (22) what? It gives me a terrific variety of good sports; (23) in particular, the stronger superstations, good (24) movies, good syndicated.

(25) You know, I'm not here to tell you that

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(1) sports is the only thing on these stations. All of (2) this programming, the mix of it, is of value. The (3) question is: What's the relative value? So they get (4) that. Those are good variety stations.

(5) Now, I'm willing to get a couple of other (6) variety stations. USA Network is a pretty good (7) variety station, not much on the way of sports (8) anymore, couldn't – didn't stay in the game. TNT is (9) a station, a cable network, that has a mix very much (10) like a superstation, very strongly sports-oriented as (11) well as movies and syndicated. But that's – you (12) know, after that I've got to look at other things.

(13) And so it's C-SPAN for public affairs and (14) CNN for news and Arts and Entertainment for those who (15) want cultural and Lifetime for those who want to have (16) the women who might be interested in its programming (17) and the Weather Channel for someone who's going to (18) travel or just likes to follow the weather and the (19) Travel Channel and on and on and on.

(20) And it's assembling the package. This is (21) why the cable operators do so much market research. (22) It's assembling the package that picks up. Maybe it's (23) just 2 or 3 channels out of my 60 that will convince (24) you to subscribe. I want to have the right variety so (25) I can convince a lot of people to subscribe because in

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(1) my 60 channels, the 5 that you like and watch might be (2) totally different than, say, the 5 that Mr. Gersch (3)

wanted to watch. And so that's why they go for a (4) variety instead of keeping adding all of these other (5) superstations.

(6) CHAIRPERSON JIGANTI: While we're at it, (7) Mr. Bortz, let me venture into a slightly different (8) area, a little bit closer to what you're talking about (9) now. If I can come – what I'm trying to define here (10) is the fundamental problem. And the fundamental (11) problem is that cable systems pay royalties for (12) distant signals.

(13) Now, the royalties, say, obtained from (14) WWOR – stay away from WGN because you think that's – (15) so they were paying it for, you know, WWOR. WWOR puts (16) on movies, syndicated matters, sports matters, and (17) public programming matters, and what kind of – I (18) don't know. I was a little bit afraid of the news (19) programs, but, yes, news programs.

(20) THE WITNESS: News and public affairs.

(21) CHAIRPERSON JIGANTI: News and public (22) affairs. Now, the problem is the money paid from (23) compulsory doesn't – paid by the systems isn't (24) divided up along the lines. And that's what gave us (25) this job here today.

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(1) THE WITNESS: That's right.

(2) CHAIRPERSON JIGANTI: We have to divide it (3) to copyright owners who provided those programs in (4) those various categories.

(5) THE WITNESS: Right.

(6) CHAIRPERSON JIGANTI: And we don't have a (7) – the program, system programmer, doesn't have a (8) budget that he distributes among all those things or (9) she has a budget distributed among all those things. (10) That programmer nearly buys a distant signal –

(11) THE WITNESS: Exactly.

(12) CHAIRPERSON JIGANTI: – for which a (13) compulsory –

(14) THE WITNESS: His budget line item says (15) "distant signals." And he buys it.

(16) CHAIRPERSON JIGANTI: Okay. I just wanted (17) to make sure that we're all at the same baseline. And (18) I don't know if it's clear. I don't know if I'm (19) totally accurate. I hope I am.

(20) THE WITNESS: I thought that was quite (21) accurate.

(22) CHAIRPERSON JIGANTI: For purposes of (23) discussion here now, do you have any –

(24) ARBITRATOR WERTHEIM: I just have a quick (25) minor – is QVC a network?

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(1) THE WITNESS: It's a cable network which (2) is a shopping channel.

(3) ARBITRATOR WERTHEIM: I was wondering what (4) category that fell into. I couldn't fit it into any (5) -

(6) THE WITNESS: Definitely what we would (7) call vertical, very narrow appeal.

(8) ARBITRATOR WERTHEIM: The same would be (9) true of Court TV?

(10) THE WITNESS: And Court TV is a very (11) vertical channel. That's right.

(12) ARBITRATOR WERTHEIM: Thank you.

(13) CHAIRPERSON JIGANTI: Mr. Gersch, I think (14) we can proceed again.

(15) MR. GERSCH: Thank you.

(16) CHAIRPERSON JIGANTI: Was that impolite or (17) -

(18) MR. GERSCH: No. I think that the more (19) questions the panel has, this is the time to get them (20) answered, not after the testimony closes.

(21) BY MR. GERSCH:

(22) Q Let's talk about the methodology for the (23) survey that you devised to try and answer this (24) question of how to divide up the royalty payments (25) among the various copyright owners. Just taking a

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(1) look at the chart on your right, survey methodology, (2) the first step, questionnaire design, if we could just (3) start with that? How did you come to -

(4) MR. LANE: Mr. Chairman, I would like for (5) you to have a point of order on this. Under the (6) rules, the witness is required first to be examined by (7) their attorney for competency to support their (8) testimony.

(9) Since most of this has been on areas that (10) I know we've discussed before and that you're very (11) interested, I've held off. But now that we're getting (12) into the substantive matters, I would like an (13) opportunity to hear what that testimony is and ask (14) some questions.

(15) CHAIRPERSON JIGANTI: I know we slid into (16) the area. I assumed that there was no objection. I (17) was wondering.

(18) MR. LANE: There is an objection to not (19) following the rules. Somehow we got -

(20) ARBITRATOR WERTHEIM: You're asking for (21) voir dire on competency?

(22) MR. LANE: I'm asking for the witness to (23) be given an indication of his competency. And then I (24) will

have some questions on that. Exactly right.

(25) CHAIRPERSON JIGANTI: I wasn't unmindful

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(1) of that fact, but when we had gone into it with no (2) objection, I had just assumed that there was no (3) problem. I'm sorry about that, Mr. Lane.

(4) But, Mr. Gersch, are you finished with (5) your questions concerning his competency?

(6) MR. GERSCH: Yes, I am.

(7) CHAIRPERSON JIGANTI: Okay. Mr. Lane, you (8) can start it off.

(9) VOIR DIRE

(10) BY MR. LANE:

(11) Q Mr. Bortz, I'm just going to talk about (12) the survey information. I have no question about your (13) competency about this stuff to which you've already (14) testified.

(15) Can you tell us what your personal (16) involvement was in the 1989 and 1992 studies that you (17) present here?

(18) **A Yes. I was involved throughout the study. (19) It began with a review of the questionnaire that we (20) had used in one first in 1983, then another one in (21) 1986. And my colleague, senior vice president of our (22) firm, Jim Trautman, will be testifying to those (23) studies.**

(24) **But we start, then, with taking the (25) questionnaire that had been developed -**

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(1) Q Excuse me. Would you just refer to (2) yourself personally, not "we"?

(3) **A Yes. I was involved in reviewing the (4) questionnaire, looking at the comments of the tribunal (5) from the '83 proceeding and was involved in developing (6) the questionnaire that was then used in 1989.**

(7) Q So you drafted the questionnaire for 1989?

(8) **A I drafted it. And I was assisted by Mr. (9) Trautman in doing that.**

(10) Q And did you draft the questionnaire for (11) 1992?

(12) **A In the same process. Mr. Trautman and I (13) both participated in it.**

(14) Q Did you undertake the sample design for (15) either the 1989 or the 1992 study?

(16) **A In doing the questionnaire design, the (17) first thing that I did was, in addition to Mr. (18) Trautman and myself, I brought in some other experts (19) to assist us. I mentioned them: Dr. Wirth from the (20) University of Denver, Dr. Reid from**

the University of (21) Georgia, and in the same design I brought in Dr. (22) George Bardwell from the University of Denver.

(23) Q So you just brought them in? You had (24) nothing to do with it personally other than bringing (25) them in?

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(1) **A That's incorrect. I was very much (2) involved.**

(3) Q All right. Well, tell us what you (4) personally had to do. That's what all of my questions (5) are, not about somebody who is not here testifying.

(6) MR. GERSCH: Let me here interpose an (7) objection. I don't believe this is competency (8) examination as to an expert. The expert need not have (9) done the study himself. An expert could come in with (10) a study that he had nothing whatsoever to do with and (11) give the usual kind of foundation for it and testify (12) in any court in the United States, even under the more (13) rigorous Federal Rules of Civil Procedure.

(14) I think the questions here are: Do you (15) have personal knowledge of everything in the study? (16) That's very different than competency of an expert.

(17) CHAIRPERSON JIGANTI: The issue under (18) review here is competency to support the written (19) testimony and the exhibits. These are rooted (20) questions on that area. And I don't know if I (21) understand what the issue is.

(22) And your specific objection as to the (23) question is?

(24) MR. GERSCH: They seem to all be going to (25) competency in the sense of a fact witness. Did you

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(1) write the report? Did you compile the numbers? Did (2) you draw the sample?

(3) Those are not the types of things which (4) establish competency of an expert. Those are the (5) types of things that establish competency for a fact (6) witness.

(7) CHAIRPERSON JIGANTI: Your objection will (8) be overruled. You may inquire.

(9) MR. LANE: Thank you, Your Honor.

(10) MR. GERSCH: Thank you.

(11) THE WITNESS: Repeat the question, please.

(12) BY MR. LANE:

(13) Q The question is: What did you personally (14) do in the sample design? Besides bringing in all of (15) these other people, did you do anything



(20) I don't recall the number of instances of (21) that, but it's a handful, two or three, just a few (22) instances a year where someone at the system says (23) "Nobody here does that. Call this office." And we (24) will do that.  
 (25) Q By the way, one of your predecessors in

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(1) 1979, BBDO, actually did go to the MSOs, didn't they?  
 (2) A Yes, they did.  
 (3) Q And they came out with similar results (4) except they were slightly more favorable to the movies (5) than to sports. Isn't that right?  
 (6) A Yes, but some of that -  
 (7) Q I'm sorry. I've got it backwards.  
 (8) A It's sports.  
 (9) Q The MSOs were more favorable to sports -  
 (10) A Correct.  
 (11) Q - than to movies?  
 (12) A That's correct.  
 (13) Q Okay. Let's go on to Question 2A, then.  
 (14) A Okay. That's on the next page. And we (15) have - after we have drawn the sample, we get the (16) statements of accounts from the Copyright Office. And (17) that provides us with the distant signal carriage. (18) And so we list that.  
 (19) And this is the first of a number of times (20) that we repeat so that they - there are a lot of (21) channels that a cable system carries. We want to make (22) sure that they know which ones are we talking about so (23) they don't confuse the distant signal station with the (24) cable channel. So here we say, "This is what you're (25) carrying. This is what the industry data told us."

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(1) And then we proceed to the second part of that (2) question.  
 (3) The second part of that question, we are (4) really asking them, "What do you think is the most (5) popular? What type, program types?" And we exclude, (6) very carefully exclude, any network programming. So (7) if they're carrying a network affiliate, we don't want (8) network programming to be mentioned. So we exclude (9) that here again.  
 (10) What was most popular with your (11) subscribers? That's a judgment they make now. We (12) have a list here, but we don't read that list. As you (13) can see, there's a caution that we just say, "Just ask (14) them the question. It's an

open-ended question." And (15) then we circle or the interviewer circles the (16) appropriate number when they get the response. And (17) that's a measure of popularity.  
 (18) Q Okay. Let's move on to the next question, (19) then.  
 (20) A Question 3, we move from popularity, which (21) is one sort of measure of value, to if somebody uses (22) certain types of programming in their advertising and (23) their promotion, quite clearly, they think there's - (24) you know, that there's a good reason for that. They (25) wouldn't use it in their advertising and promotion

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(1) unless they thought it was something of substantial (2) value to their subscribers.  
 (3) So, again, we say "Did you feature any (4) programming" by these stations that I mentioned and, (5) then, again careful to exclude other than any national (6) network programming from ABC, CBS, and NBC, "in your (7) 1992 advertising and promotional efforts?" And, (8) again, at this point we don't prompt them. It comes (9) off the top of their head as to what they use in (10) advertising and promotion.  
 (11) Then if they haven't mentioned certain (12) categories, which typically they haven't, we go to 3C, (13) which then goes to a list that you'll find on Page 47. (14) And anything that they - they will have recorded the (15) answers to 3B by circling a - let's say somebody (16) mentioned movies. Under Q-3B unaided, they would have (17) circled 1. So if they mentioned movies and sports, it (18) would be 1 and 2.  
 (19) We would then say, "Well, did you also (20) feature syndicated shows, series, and specials?" And (21) they'll tell us "Yes" or "No." And that will be (22) entered under 3C. So we're able to keep track of what (23) they told us off the top of their head and what they (24) told us when they were prompted.  
 (25) And then that takes us to 3D. So we've

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(1) stepped through this unaided and then aided in terms (2) of advertising and promotion. I think I misspoke when (3) I said most popular. It was using advertising and (4) promotion in Question 3.  
 (5) And then we ask them directly as the (6) person most responsible for making program decisions (7) "Which

of those did you feel was the most important (8) programming type to feature in subscriber acquisition (9) and retention advertising and promotion? What was the (10) most important?" because when we're talking about (11) distant signals, no advertising sales opportunity.  
 (12) The reason that you carry it is to attract (13) and retain subscribers to your basic service. What's (14) the most important that you use to promote getting (15) subscribers and keeping them on? And we ask them the (16) second most important and what was least important. (17) And that completes Question 3.  
 (18) Q Okay. Let's move on, then, to Question 4.  
 (19) A Yes. Question 4, which if you read the (20) past proceedings you know has been often discussed and (21) it came up earlier today in questions to me about (22) relative value, "How do we best measure the relative (23) value of programming on those signals?" (24) As the panel has pointed out to me, you (25) understand that they have a budget for a distant

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(1) signal. They buy it. They don't have to make that (2) categorical kind of decision. So we have to try and (3) get the best estimate possible of that categorical (4) decision.  
 (5) When we did the original questionnaire (6) designs, one of the things that we thought about was (7) a question that was raised by the panel, Judge (8) Wertheim: Why not tell them what their program budget (9) is and have them allocate that program budget?  
 (10) There's some survey issues that we (11) confronted 10 years ago on that. Of primary concern (12) to us was that we wanted essentially these programmers (13) to be dispassionate in answering a question.  
 (14) They don't know why we're calling and (15) going through this. We don't say "We're calling. (16) We're trying to allocate money that you pay in for (17) carrying distant signals to copyright." (18) If we say \$28,000 to a system, suddenly I (19) think they feel they're in a negotiation. You know, (20) maybe we're from the Copyright Commission. Maybe the (21) rates are going to go up. If we say we really think (22) this stuff is popular, maybe they're going to charge (23) us more.

(24) We don't want them to know why we're (25) calling, just as our interviewers don't know who

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(1) they're working for other than us. They don't know (2) that we are doing work for the Joint Sports Claimants. (3) Our interviewers at Burke are kept - all they know is (4) that Bortz and Company is having them do a survey. (5) And they're asking all of these different categories. (6) They have no reason to focus on one or the other. For (7) the same reason, we didn't want to use that.

(8) Second, - and I think that we would (9) probably spend days in expert debate saying, "Well, (10) but you asked this system to allocate \$25,000. And, (11) behaviorally, you know, if another guy was asked to (12) allocate 10,000, would that affect how they did their (13) allocation? And so is it really a measure of the (14) relative value or are they affected by the size of the (15) number or if it's a small system, are they affected (16) differently than a large system?" There were just a (17) number of imponderables.

(18) I have to say that there's nothing (19) theoretically wrong with that, but we wanted to keep (20) the operators dispassionate on it. And we decided (21) after consulting with a number of people and our own (22) experience in survey research and the fact that we use (23) constant sum in other work that we do and Mr. Book at (24) Malarkey Taylor uses constant sum - I think you've (25) seen the testimony of Dr. Reid at University of

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(1) Georgia on constant sum.  
(2) The largest cable operator that we've (3) mentioned a few times here today, TCI, their head of (4) market research frequently uses constant sum to get (5) their subscribers to allocate relative value of (6) different types of programming as they address: What (7) do services do we introduce? It's a new services (8) survey that is done by TCI in a number of systems. (9) And they use constant sum.  
(10) So we looked at dollars. We looked at (11) constant sum. There are other approaches, a scale. (12) You know, on a scale of 1 to 10, what do you think is (13) best?  
(14) There are real problems with scales. So (15) after consulting with the appropriate people, based on (16) our own experience, we said, "We'll use constant sum." (17) And that has

been refined a bit over the years as we (18) try and get the exact wording such.

(19) I think at one time - and I don't (20) remember exactly - if it was \$100 that was to be (21) allocated or 100 percent, allocated 100 percent. And (22) based upon the responses, both in the findings of the (23) tribunal, questions from - under cross-examination in (24) the past, we've decided that allocating a fixed budget (25) was a reasonable position of this.

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(1) We're not asking you to allocate 100 (2) percent. We're not asking you to allocate 100 points. (3) We're asking you to allocate a fixed budget. By the (4) way, we're not asking you to allocate what you paid (5) because - even for, say, the first six months of the (6) year, for the reasons I've already mentioned.  
(7) So that is the basis. And I'm sorry to be (8) so wordy on this, but this I think is very important. (9) We - specifically, as you see in 4A, we repeat the (10) stations that we're talking about. We don't expect (11) them to necessarily remember those from the earlier (12) questions.  
(13) So we say we're only interested in U.S. (14) commercial stations, - and then we read the stations (15) - U.S. noncommercial stations. And we read that so (16) they make sure that they're clear as to which ones are (17) commercial and noncommercial and the Canadian (18) stations. So we repeat that.  
(19) And then based upon the comments out of (20) the '89 proceeding, we - whereas, in '89 we then (21) asked them to allocate this percentage, what we then (22) here said was, "Okay. I'm going to read the program (23) types. I'll read all the program types that were (24) broadcast to give you a chance to think about that. (25) We don't want you to do this quickly. Please write

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(1) down the categories." (2) So we want them to have something written (3) in front of them to look at since they're going to be (4) doing an allocation. We don't want them to try and do (5) it all in their head.  
(6) And then we go on and say, "Assume you (7) have a fixed dollar amount to spend in order to (8) acquire all the non-network programming. Excluding (9) the network programming, actually broadcast during (10) 1992 by the

stations, what percentage, if any, of the (11) fixed dollar amount would you spend? Please write (12) down the estimates" so they can see it in front of (13) them.

(14) And, again, this was in response to the (15) findings of the tribunal. "Write down the estimates. (16) Make sure they add to 100 percent." And then we go (17) on, "What percentage, if any, of the fixed dollar (18) amount" - then we asked - we've now got it written (19) down - "would you spend on?" Then we go through (20) these program types.

(21) Now, you see we have movies listed first. (22) And then we have live and professional sports and then (23) syndicated. But you'll see the column is labeled (24) "Random Sequence." (25) There is always a concern in survey

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(1) research that there could be a position bias. In (2) other words, if - maybe being listed first is the (3) best position or maybe being listed fourth is the best (4) position. So we don't want to get that at all. And (5) so what we do is we ask them what number they put down (6) because we've assigned a random sequence.  
(7) So we at our company essentially randomize (8) these numbers. And then the random sequence may come (9) up. And we look at the cards. Movies is going to be (10) asked number two. So we will have filled in on the (11) questionnaire before we give it to the research firm, (12) Number 2 by movies, Number 5 by live professional and (13) college sports, Number 1 by syndicated and so forth.

(14) The next questionnaire will have them in (15) a different order. And so the surveyor is trained - (16) and this is a common thing in survey research - to (17) read them according to the numbers by them so we (18) randomize when they're asked. And so we get that.

(19) And then again to make sure that that is (20) the best representation that they can give us of their (21) perception, we go to Page 49, 4B. And we say, "Now (22) I'm going to read back these categories and your (23) estimates. Is there anything you want to change?" (24) And that's it. And so it's a very (25) deliberate process trying to minimize the difficulty

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(1) of this for someone because, in

effect, this isn't (2) what they do at the station, you know, at the cable (3) system. They negotiate the cable networks. And they (4) pay distant signals for distant signals.

(5) But this process is different. And so (6) we've tried to take them through it slowly, carefully, (7) deliberately. And they don't know that we're talking (8) about copyrights. So they aren't sitting there (9) saying, "Oh, my gosh. Am I going to have to pay (10) more?"

(11) Q Before going on, let me just go back to (12) one of the points you raised in connection with (13) Question 4. You talked about how it's certainly (14) theoretically possible to go back and look at what you (15) referred to as their actual distant signal budget. (16) Just to make it clear, their distant signal budget, (17) those are their royalty payments. Is that right?

(18) A Their distant signal budget is a royalty (19) payment, yes.

(20) Q Let's go to the next step on your survey (21) methodology, which is the sample selection. Let's (22) just start basically. Why do you bother with a (23) sample? What's the need to take a sample?

(24) A Well, there are roughly 2,000 Form 3 (25) systems. We've focused on Form 3, as I think is done

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(1) in this proceeding, because that's 97 percent of the (2) royalty. But 2,000 is a lot of systems to try and (3) contact. And so we use appropriate sampling (4) procedures, as I think any professional firm would do (5) in such a situation.

(6) The question then is what kind of sample. (7) A key element to keep in mind is all cable systems are (8) not created equal because some will pay in a lot of (9) money to the tribunal. And a small system will pay (10) very little. So we'll have systems that will pay (11) \$200,000 and a system that will pay 3,000.

(12) There are a lot more smaller cable systems (13) in this country than larger ones. But we want to make (14) sure that we probably weight the answers they give us (15) by how big a buyer are you because if I'm a seller and (16) I want to total up what I'm getting, just because a (17) small buyer says he's going to give me a high (18) percentage, if the big buyers don't like my product (19) and they're going to give me a low percentage, they (20) have to be appropriately weighted by their royalties.

(21) So we had two things that we had to (22) address here, two elements, in our sample design. (23) Number one is we didn't want to contact all of the (24) systems. We wanted to do a sample and a highly (25) reliable one, which goes to the statistical design.

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(1) And, number two, we wanted that sample to (2) reflect the fact that the big systems have more clout. (3) They pay in more copyright dollars than the small (4) systems.

(5) If we didn't do a stratified sample, - (6) and, as Mr. Trautman will testify to, in 1986 we did (7) a non-stratified sample - we would be (8) over-representing the opinions of the small systems (9) representing in the aggregate not a real big (10) percentage of the revenue.

(11) So by stratifying the sample, saying we're (12) going to make sure that we give the proper weight to (13) how much they pay, then we're able to say, "Okay. We (14) want to come up with strata, the stratifications."

(15) These stratifications, our divisions, we (16) use four strata because if you - again, Dr. Bardwell (17) could testify to this, but if you go beyond four, you (18) don't improve the precision of the measurement much. (19) Four is a reasonable number.

(20) The question then is: How do you go about (21) designing the strata? And I don't know how much (22) detail I can go into a lot, but basically we go (23) through certain statistical formulations that say (24) "Here's where you draw the boundaries." (25) We go - we get all the systems from the

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(1) Copyright Office and how much they pay. And we (2) compile a big list of these systems and how much they (3) pay. And we order those. Our staff does that.

(4) And we give Dr. Bardwell a list that says, (5) you know, "From lowest paying system to highest, (6) here's a bunch of systems. Now take a look at it.

(7) He applies these formulas and says, "Well, (8) draw the line here on royalty payments and, by the (9) way, applying other formulas in the sample, take - I (10) want you to take X number of systems in this strata, (11) a different number in the other strata, and so forth." (12) So we then come up with a sample.

(13) And I could go into much more

detail. I (14) don't know that that's wanted.

(15) CHAIRPERSON JIGANTI: I think at this (16) point we could think about that for a little while. (17) We can take a 10-minute recess.

(18) MR. GERSCH: Thank you, Your Honor.

(19) (Whereupon, the foregoing matter went off (20) the record at 4:32 p.m. and went back on (21) the record at 4:44 p.m.)

(22) CHAIRPERSON JIGANTI: You may proceed, Mr. (23) Gersch.

(24) MR. GERSCH: Thank you.

(25) BY MR. GERSCH:

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(1) Q Mr. Bortz, let's go to Step Number 3 under (2) your chart, "Survey Methodology." Let me just ask (3) you: What's the pretest step?

(4) A Yes. Pretest. When you have a survey, as (5) much as you think you've refined it and honed it, you (6) want to make sure that when that gets out of the field (7) and used by interviewers, that two things happen: (8) that, number one, the interviewers know how to use it (9) appropriately and aren't confused by any - either the (10) wording or the sequencing of the process; and, second, (11) that those being interviewed understand the questions (12) and can properly give responses, instead of saying, (13) "Well, I don't know what you mean by that" or "That's (14) not clear to me." (15) So you do a pretest to make sure that your (16) survey when it goes out is going to have a minimum of (17) problems in execution. And we do that early in (18) December. In 1992 we did it in early December of (19) 1992.

(20) Q With respect to the pretest step, that's (21) a step that you would do for a survey you conduct for (22) commercial clients as well?

(23) A Yes. We always do a pretest of any (24) broad-based survey.

(25) Q Okay. Let's go to Step Number 4, the

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(1) survey administration process. I believe you said (2) that the actual survey is done by an outfit called (3) Burke. Is that right?

(4) A Yeah, Burke Market -

(5) ARBITRATOR WERTHEIM: Excuse me. On a (6) pretest, how many respondents was the survey form (7) pretested on?

(8) THE WITNESS: I don't recall that number. (9) I really don't recall it. I think it's on the order (10) of 10.

(11) MR. GERSCH: All right.

(12) BY MR. GERSCH:

(13) Q Going back to Number 4, the survey (14) administration, you were going to tell us who the (15) Burke firm was.

(16) A Yes. Burke is -

(17) Q Is.

(18) A - Burke Market Research. It's a very (19) large market research firm. It does work (20) internationally. It's based in Cincinnati, Ohio. And (21) we have used Burke ever since the 1983 survey.

(22) Do you want to discuss more regarding that (23) element?

(24) Q No, I don't, but thank you.

(25) (Pause.)

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(1) MR. GERSCH: I'm sorry. I was trying to (2) entertain a question here.

(3) BY MR. GERSCH:

(4) Q With respect to Burke, the one question I (5) did want to ask there is: Do they specialize in doing (6) certain kinds of surveys?

(7) A Yes. Burke is - one area of special (8) expertise is what they call executive interviews. (9) That means rather than calling, say, households at (10) dinnertime, they're calling business people in their (11) offices. (12) And since that's what we're doing, that (13) was one of the reasons that we selected Burke (14) initially.

(15) Q All right. And -

(16) A In fact, they have a special group that (17) does it, special interviewers who are executive (18) interviewers.

(19) Q And you and Jim Trautman are the ones that (20) trained them in terms of this survey instrument?

(21) A That's correct.

(22) Q What kind of response rate did you get on (23) the survey?

(24) A The response rate that we got was in terms (25) of the first three questions - was about 81 percent.

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(1) I'd have to refer here in the report for the specific (2) number. In Question 4, the allocation question, was (3) about 78 percent.

(4) Q There's a section of your testimony, which (5) goes into detail, which I will not do here, but Pages (6) 20 through 24, if you could just take a look at that, (7) Section 4, IV-B. And if you could just briefly (8) describe, what is it that you're addressing in Section (9) IV-B of your prepared testimony?

(10) A At the bottom of Page 20?

(11) Q That's right.

(12) A This was just to recount for

you what we (13) did in response to the concerns that were raised by (14) the CRT after the 1989 proceeding. I think I already (15) touched on some of these. So I'll go through it kind (16) of quickly.

(17) The first one, "Respondent (18) Qualifications," we've always had a very high level of (19) qualification, certainly by title, of the respondents, (20) but there was a feeling that we could do better.

(21) I think what we did in the past was fine, (22) but there were like 11 percent of the respondents in (23) which some questions were raised in prior proceedings. (24) And so we asked for the person most responsible for (25) programming decisions.

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(1) And, as you can see in the table on Page (2) 21, you know, we didn't end up with people in the (3) other category, the customer service managers, - I'm (4) comparing it to '89 - just a handful of people who (5) had officer manager or operations manager kind of (6) titles. So by changing the question, we did elevate (7) the title profile of our respondents. And that was in (8) response to the concerns.

(9) The second area is category definition. (10) We believe you can't give people a long and detailed (11) category definition. On the other hand, there were (12) concerns that our category definitions were not close (13) enough to what the tribunal had been utilizing.

(14) And you'll see on Page 22, in Table 6 on (15) Page 22, that we used very brief descriptions, (16) obviously just the - basically the label. In '89 and (17) '92 we used definitions which were very close to the (18) definitions that the tribunal has been using. So it's (19) a little longer, but not much longer.

(20) I can go through those, but if you have (21) any questions. But it was basically just refining a (22) bit to make sure that the respondent knew what (23) category we were talking about.

(24) The third area had to do with public (25) television and Canadian stations. And this is one

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(1) where I guess we weren't quite as responsive in some (2) ways. And that is if a question was raised about, (3) well, let's say a cable system - do you want me to go (4) into the detail of this?

(5) Q Just briefly -

(6) A Let's say a cable system -

(7) Q - to just get an overview.

(8) A - wanted to carry a public television (9) station, commercial station, (10) noncommercial station, (11) but decided they couldn't afford it in terms of their (12) distant signal budget. Shouldn't they also be asked (13) about - I mean, doesn't - that didn't mean the (14) programming didn't have any value for them. It just (15) didn't have enough value for them to go ahead and (16) carry that signal.

(16) And I understand that. I can understand (17) that position. What we were measuring here as I went (18) through the questionnaire was very precisely: What (19) value do you allocate to the signals you carried?

(20) It could be done the other way, but we (21) feel that the measurement here should be unambiguous. (22) And we attributed value only to signals that you (23) carried. And so I did understand the tribunal's (24) comments and the comments of both the Canadian and (25) public television, but we felt that we should keep it

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(1) to only the signals that you carry.

(2) Responder recall had been an issue, (3) although we got, as you'll see when Mr. Trautman (4) testifies, a real consistency of response, even with (5) various changes year to year in how the survey was (6) done, including when it was done more past the end of (7) a year. But we wanted to make sure that we responded (8) there. And that is that we now start the survey (9) quickly, even before all the '92 records were (10) completed.

(11) So we began in December. And as soon as (12) we get to the level of sample that we need, we end the (13) work. And it was ended I think by early April with (14) most of the interviews done by March of '93 so that (15) they could clearly recall '92. And that was the (16) process.

(17) And the fifth was the budget allocation (18) process. We've gone through that. I can answer any (19) questions if you have it, but I went through how we (20) added. "Let's write it down, think about it. Tell me (21) what you have. Now do you want to change it?" Those (22) were done in response to the concerns of the tribunal.

(23) Q Mr. Bortz, if you'll just turn back

(8) Q And you added the devotional programming (9) in 1989?

(10) A Yes, I did.

(11) Q And now that you've added it in response (12) to the criticism, - I know you didn't talk about it (13) - these are the results that you've come up with when (14) you include devotional programming as well. Is that (15) right?

(16) A That's correct.

(17) MR. GOTTFRIED: I have no further (18) questions.

(19) CHAIRPERSON JIGANTI: Any motions pending?

(20) (No response.)

(21) CHAIRPERSON JIGANTI: You may proceed, Mr. (22) Gersch.

(23) ARBITRATOR WERTHEIM: Just let me ask a (24) question. In what areas are you tendering the witness (25) as an expert?

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(1) MR. GERSCH: Well, I'm tendering him to (2) support the study that's contained in his testimony. (3) And he's testified to all matters with respect to the (4) study and its conclusion.

(5) MR. LANE: In that case, just to be clear, (6) I'm not going to make a motion now, but I will reserve (7) my right upon questioning if I don't feel that Mr. (8) Bortz is competent to testify to, I will object at (9) that time. But at this moment, since there will be (10) substantive questions, I'd like to reserve that right (11) now, but I won't make a motion at this time.

(12) CHAIRPERSON JIGANTI: You've made your (13) statement. The statement's in the record.

(14) You may proceed, Mr. Gersch.

(15) FURTHER DIRECT EXAMINATION

(16) BY MR. GERSCH:

(17) Q Mr. Bortz, if I could just follow up on (18) some of the questions you just were asked? Do you do (19) surveys for your commercial clients?

(20) A Yes. Our company routinely does surveys, (21) a large number, every year.

(22) Q And when you do those surveys, do you have (23) to sample the industry, much as you had to do here?

(24) A There is always a sampling design. And it (25) can be sampling related to industry elements. It can

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(1) be sampling of subscribers. And we do that both (2) domestically and internationally.

(3) Q And when you do surveys for your (4) commercial clients, not for these kinds of (5) proceedings, do you personally design the sample?

(6) A No. I typically have someone design the (7) sample. We have a

statistician on our staff, Arthur (8) Steicker, who is often involved in sample design. We (9) sometimes consult with Dr. Bardwell.

(10) We use other consulting firms and survey (11) firms that assist us. And we use them on a regular (12) basis, depending on the nature of the study. So it (13) can be Chilton Research, which is a big company. It (14) happens to be owned by ABC. (15) We have worked jointly with Nielsen on (16) surveys where we have them do a sample design to our (17) specifications and a number of other firms, smaller, (18) not nationally known firms, but highly competent. So (19) it is our normal practice to involve experts in sample (20) design.

(21) Q So that insofar as you have chosen to rely (22) on the work of another expert, a Dr. Bardwell, with (23) respect to the sampling, in connection with this (24) study, that's no deviation from the procedure you (25) would follow outside of a litigation? That's the same

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(1) procedure you follow for your commercial clients?

(2) A For commercial clients we typically (3) involve experts to assist us in certain areas.

(4) Q Okay. Thank you for making that clear.

(5) Let's go back to the design of the (6) questionnaire. I just want to be clear. You (7) mentioned Dr. Bardwell, getting help from him on the (8) sampling. Who are some of the other folks that you (9) got assistance from? (10) A Yes. Dr. Michael Wirth, who is head of (11) the Department of Mass Communications at the (12) University of Denver. Dr. Wirth and I have worked (13) together on projects dating back even prior to my (14) coming to Washington. I think we first got together (15) in 1977. He assists us on a number of projects. He (16) assisted in the questionnaire design.

(17) Dr. Reid from the University of Georgia (18) also assisted in the questionnaire design with (19) particular attention to what we call the constant sum (20) approach. So they were very much involved in our (21) questionnaire design.

(22) Q Dr. Reid's area of expertise is what?

(23) A Well, his expert is in survey and market (24) research at the University of Georgia.

(25) Q Also did you consult a Dr.

Booker?

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(1) A Yes, Sam Book, Dr. Book, at - I guess (2) they're now called MTA Associates or Malarkey Taylor, (3) is again someone that I have known for a number of (4) years. And we had him involved also in questionnaire (5) design.

(6) Q At this point if you could turn to, I (7) think it is, Appendix C of your testimony, I believe (8) that contains the survey instrument used in 1992. Is (9) that right?

(10) A That's correct.

(11) Q And if you could walk us through that and (12) your questions there?

(13) A Okay. Well, we start - it's Page 45. We (14) start with identifying obviously the system, the remit (15) numbers, an identifier that the Copyright Office (16) assigns. We get from some other industry sources (17) subscribers who we're calling for initially, say, (18) who's the general manager of the system. (19) And then we go into trying to find the (20) appropriate respondent at that system. And we ask for (21) the person most responsible for making programming (22) decisions in 1992.

(23) Prior to 1992 we had asked for the person (24) most familiar with, but in responding to concerns of (25) the tribunal in the '89 proceeding, we just changed

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(1) that wording very slightly.

(2) We have in all of the surveys typically (3) had people, a vast majority of those we talked to, of (4) very senior management positions at the systems. That (5) gets us the appropriate respondent.

(6) Q Let me just stop you before you go on and (7) raise this question. That Question Number 1 that you (8) just referenced, that's directed towards someone at (9) the system level, not at the MSO level; right?

(10) A That's at the system level. No. It's at (11) the system level. If they say, "Well, you know, we (12) don't really have somebody here most responsible for (13) programming decisions. That's somebody at the (14) district level" or "at the MSO level," then our (15) interviewers have been instructed after making sure (16) that indeed there's no one at the system who feels (17) that they were responsible for programming decisions, (18) that we will then go ahead and call, get a reference (19) and call, someone at the next level.

else?

(16) A Yes. I met with Dr. Bardwell. We (17) discussed and debated the issue of whether we should (18) have a stratified random sample or we should go to a (19) non-stratified approach.

(20) I instructed him as to the kinds of levels (21) of accuracy or confidence levels that I would want to (22) have in the key question and then asked him to come (23) back with a sample design which we could make use of.

(24) Q And did you tell him to use the formulas (25) that you've cited on Page 18 of your testimony, for

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(1) example, for the 1989 study in taking the sample (2) design?

(3) A You're referring to the second paragraph (4) under 2?

(5) Q Exactly.

(6) A The formulas he recommended that we use in (7) order to come up with the most precise estimate.

(8) Q And are you qualified or can you answer (9) questions about those formulas and how they work as (10) they apply to the 1989 and 1992 studies?

(11) A I can certainly describe the nature of the (12) formulas. The purpose for which they're intended, (13) therefore, is of direct relevance to what it is that (14) I'm testifying for. (15) The derivation of the formulas, the (16) academic support of those formulas Dr. Bardwell could (17) provide. And, in fact, Dr. Bardwell will be coming (18) into town tonight. (19) If the panel would like to hear from Dr. (20) Bardwell on those items, he will be available here to (21) provide that background. But I'm fully aware of why (22) those rules were used. And they were to meet goals (23) that I had specified to Dr. Bardwell.

(24) Q Did you -

(25) ARBITRATOR WERTHEIM: Excuse me.

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(1) MR. LANE: Sorry.

(2) ARBITRATOR WERTHEIM: You referred to a (3) formula. Are you referring to this for a strata of (4) royalty classes or something else?

(5) THE WITNESS: I believe he's referring to (6) the cum square root of F rule.

(7) ARBITRATOR WERTHEIM: I don't see that on (8) Page 18.

(9) MR. GERSCH: Third full paragraph.

(10) THE WITNESS: Page 18, third paragraph.

(11) ARBITRATOR WERTHEIM: Okay.

(12) THE WITNESS: The second sentence refers (13) to the cum square root of F rule. And the fourth (14) sentence refers to Neymann's allocation formulas. I (15) believe those are the only two formulas referred to (16) here.

(17) ARBITRATOR WERTHEIM: Thank you.

(18) BY MR. LANE:

(19) Q Turning to Page 19, during what period (20) were you involved in overseeing the selection and (21) training of interviewers? Is that for the 1989 study (22) or for the 1992 study?

(23) A For both.

(24) Q Did you personally meet with them?

(25) A I participated in '89 and '92 on the

Page 578

(1) telephone. It was a telephone conference. Mr. (2) Trautman was personally there. This firm is based in (3) Cincinnati. And I was on the telephone for the (4) training session.

(5) Q I'd like to turn to Appendix D of your (6) testimony, if you would. That's on Page 50. Did you (7) design these statistical estimation procedures for (8) this study?

(9) A That was designed by Dr. Bardwell, who I (10) brought in as our consultant to do that.

(11) Q Did you perform any of the calculations (12) from these formulas as they relate to the 1989 or 1992 (13) study?

(14) A My staff performed those calculations (15) under my direction.

(16) Q Did you write Appendix D?

(17) A I did not.

(18) Q And can you answer questions about (19) Appendix D and how it applies to the 1989 and 1992 (20) studies that you present?

(21) A Yes, I can answer these in a general way. (22) Again, as I said, if you want to get down to the (23) mathematical derivation or to say why the cum square (24) root of F rule provides you the maximum - essentially (25) the minimum error in setting the boundaries of the

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(1) strata.

(2) That's a mathematical formulation that Dr. (3) Bardwell would have to address, but I know why it was (4) used. And it was used to achieve objectives that I (5) specified.

(6) MR. LANE: Those are all the

questions I (7) have on voir dire.

(8) CHAIRPERSON JIGANTI: Any other questions (9) on the issue of competency?

(10) MR. GOTTFRIED: I have a few questions and (11) the objection, Your Honor. My name is Barry (12) Gottfried, and I'm one of the lawyers to the (13) Devotional Claimants.

(14) THE WITNESS: Hello.

(15) MR. GOTTFRIED: Good afternoon, Mr. Bortz.

(16) VOIR DIRE

(17) BY MR. GOTTFRIED:

(18) Q You weren't paid by the Devotional (19) Claimants to do this study, were you?

(20) A No, I was not.

(21) Q And, in fact, you gave a kind of a long (22) list of people you worked for, and I didn't hear any (23) names of religious programmers in that list.

(24) A That's correct.

(25) Q You've never worked for a religious

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(1) program, have you, sir?

(2) A No.

(3) Q Now, in fact, the first time I was in this (4) case, Mr. Bortz, - I know you go back longer than I (5) do - was 1983.

(6) A Yes.

(7) Q And you recall you did a study in 1983 for (8) the Sports Claimants?

(9) A That's correct. In fact, that was the (10) first time that we were involved in -

(11) Q Oh, it was also?

(12) A Yes.

(13) Q Well, we started together, then. I (14) thought you did one in '79.

(15) A No, that was not done by -

(16) Q In that study - and I'll refresh your (17) recollection if you need. I'm looking at Mr. (18) Trautman's testimony. You asked about four or five (19) programming categories depending on whether a PBS (20) station was on, but you didn't ask about devotional (21) programming. Is that correct?

(22) A That's correct.

(23) Q And if I look at Page 10 of Mr. Trautman's (24) testimony, you were criticized for not asking about (25) devotional programming that year. Is that correct?

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(1) A That's correct.

(2) Q By the tribunal?

(3) A Yes.

(4) Q And in response to that criticism, I think (5) you said to Mr. Lane you were involved in designing (6) the questionnaires?

(7) A Yes.



to (24) Page 21 for a moment, your Table Number 5? First (25) column under 1989, "Number of Respondents," you have

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(1) a total of 18 there. I think that may be a typo.  
 (2) CHAIRPERSON JIGANTI: One ninety-eight.  
 (3) THE WITNESS: Okay. Yes, obviously. (4) Yeah, it was different. Thank you for totalling it. (5) One ninety-eight.  
 (6) MR. GERSCH: Thank you, Your Honor.  
 (7) BY MR. GERSCH:  
 (8) Q Let's go to the final step in the process, (9) which is an analysis of your results. So let's go (10) over to Page 24, Table 7, where you've got the results (11) for your first question on your survey, in which you (12) ask the cable operators what in their view was the (13) most popular type of programming with their (14) subscribers. What did you find there?  
 (15) A Well, we found that live professional and (16) college team sports was the most popular, as you can (17) see from the numbers there. And we also found that it (18) was a - the mean number in the survey was a bit (19) higher, but I should point out that those fall within (20) the sort of band of uncertainty or the confidence (21) interval. That falls without those numbers. So you (22) can't assert too much with respect to popularity, but (23) at least the means were somewhat different.  
 (24) And second was movies and then syndicated (25) series and shows. In both cases I think it's somewhat

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(1) interesting to take a look at. If you combine the (2) movies and shows and look at that with live (3) professional and college team sports, they're fairly (4) close in terms of the total of those two categories (5) with the sports category.  
 (6) Q Okay.  
 (7) A And, remember, this was done unprompted. (8) This was just asking what's most popular. And we (9) didn't list the different categories. So it's an (10) unprompted response.  
 (11) Q Just going back in terms of the (12) formulation of Question Number 2, the question that (13) gave you these responses, I want to go back to your (14) questionnaire for a second.  
 (15) The question you asked there is "What (16) types of programming

broadcast by these stations, what (17) was most popular?" So this isn't limited to a (18) particular type of programming. Is it limited to (19) distant signal programming here?  
 (20) A Is it - excuse me?  
 (21) Q Are you limiting yourself to distant (22) signal programming when you ask this question?  
 (23) A This is limited to distant signal (24) programming. We repeat the fact that it's not (25) national network programming. We don't want the

Page 610

(1) network, say, packages of baseball or football or (2) whatever to appear in here. So we make it very clear (3) that we're talking about non-network programming.  
 (4) Q Okay. Let's go on to the questions you (5) asked about advertising and promotional use of (6) programming. Turn to the next chart on Page 26, top (7) of Page 26. How many of the respondents said that (8) they utilized distant signal programming in (9) advertising and promotional efforts?  
 (10) A We can see it's about a third in both (11) years, 91 and a half percent to be precise for 1992.  
 (12) Q And you ask those follow-up questions?  
 (13) A That's right. Now it's important - okay. (14) We said, "Do you use it?" And only if they said they (15) use it did we go on to the next one.  
 (16) Q What did you find there?  
 (17) A Well, there we found that it was sports, (18) live professional and college team sports, was almost (19) universally used in advertising and promotion. That's (20) in Table 9 on Page 26. No surprise at all. Anyone in (21) the cable industry who reads the trade magazines and (22) goes to the trade shows know that sports are heavily (23) featured.  
 (24) Movies are also featured, about half the (25) systems in 1992. And that's a sharp drop-off from

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(1) 1989. We have a fairly wide confidence interval here. (2) But, even so, it's notable. And I think there are (3) some reasons that might apply to that. And then (4) syndicated shows and series is 38 percent.  
 (5) So what you see is overwhelmingly sports (6) is used. And then the others are used, but not nearly (7) as much as sports. Sports is almost twice the amount (8) of movies.  
 (9) Q So when you asked the cable

operators, the (10) system owners, what it is that they actually featured (11) when they do advertising and promotion, the category (12) they cite most is sports?  
 (13) A By far.  
 (14) Q And then you asked that question a little (15) bit differently. And you report those results at the (16) top of Page 28. Is that right?  
 (17) A That's right because now we're saying not (18) "What do you feature?" but "What was most important in (19) what you do?"  
 (20) Q And what were the responses you got there?  
 (21) A That's Page 28, Table 10. 67.7 percent of (22) the respondents said that live professional and (23) college team sports was most important. And that's (24) consistent, really, with the earlier question in that (25) it's almost universally used where it's more

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(1) selectively used for the other categories. I think (2) the responses across these questions are quite (3) consistent.  
 (4) Q All right. Let's turn now to your (5) constant sum question, where you actually ask the (6) operators to make a determination based on a constant (7) sum which of the various different types of (8) programming at issue in this proceeding are of what (9) type of value. What did you find? That's on the top (10) of Page 30. What did you find there? We've still got (11) the chart that shows some of your results.  
 (12) A Right. The chart essentially repeats what (13) you would see in Table 11 on the top of Page 31. And (14) it showed that 38.8 percent of the allocation would go (15) to live professional and college team sports. That's (16) up from the 1989 number of 34.2. (17) 25.6 percent would go to movies. That has (18) gone down. That's kind of consistent with a rather (19) different question in Question 3 about what's most (20) important, but they're internally consistent, the (21) answers to 3 and to 4.  
 (22) And then the other categories, syndicated (23) shows of 16 percent, news and public affairs at 12.4, (24) devotional and religious programming at 3.9 percent, (25) PBS and other programming carried on noncommercial

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(1) stations at 3 percent, and Canadian programming at .3 (2) percent.  
 (3) Q And just if you compare I guess

the '92 (4) results with the '89 results from the last proceeding (5) with respect to sports, you found that the share (6) allocation was higher. Is that right?

(7) **A Yes. And it's consistent with the (8) expectations that I would have had - that I did have.**

(9) Q And, likewise, the share for movies in '92 (10) is lower than in '89. Is that right?

(11) **A Share for movies dropped somewhat. (12) Syndicated, I think the differences there are not (13) statistically significant. So that stayed about the (14) same.**

(15) Q Okay.

(16) ARBITRATOR WERTHEIM: Why do we such a (17) substantial variation among the absolute confidence (18) intervals in these various categories?

(19) THE WITNESS: Yes. You mean going across (20) the different questions?

(21) ARBITRATOR WERTHEIM: Yes. Well -

(22) THE WITNESS: Within the table on Page 31?

(23) ARBITRATOR WERTHEIM: Yes, similar to the (24) previous table.

(25) THE WITNESS: It has to do with the sample

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(1) size, the number of systems that are responding in (2) each case, and the absolute magnitude of the number (3) that they give you, although 2.2 percent is a wider (4) interval, say, than in news and public affairs and 1.7 (5) percent. It's a smaller percentage of the number.

(6) In other words, the percentage uncertainty (7) of 38.8, the 2.2 points is less uncertainty as a (8) percentage of the total number. But that just comes (9) from taking the number of responses, how they're (10) weighted, putting that through the statistical (11) analysis, and calculating the confidence interval for (12) each category that was answered.

(13) In my view, basically they're comparable. (14) I know that you see some things with devotional, (15) religious, and Canadian down at very low levels. It (16) has to do with the very small population of those (17) stations. But the others are really pretty much in (18) the same range.

(19) I would suggest for simplicity that you (20) could say, you know, these numbers are probably good (21) within plus or minus two percent. And that's a pretty (22) good number from a survey, plus or minus two percent.

(23) ARBITRATOR WERTHEIM: And these figures (24) for PBS and Canadian

programming are only percent (25) allocation among those respondents who said they did

#### Page 615

(1) some public and Canadian programming?

(2) THE WITNESS: Only those respondents who (3) - for whom we had call - we had the statement of (4) account and said they carried that signal or they told (5) us that they carried the signal, yes.

(6) It's only for those respondents who (7) carried the signal. There's no value given here to (8) respondents who might have carried the signal at a (9) lower price.

(10) MR. GERSCH: Okay.

(11) BY MR. GERSCH:

(12) Q Mr. Bortz, with respect to your findings (13) in your survey, the sports category, the most valuable (14) category of programming with respect to distant signal (15) programming, I believe you said that that was (16) consistent with your experience. How does your (17) experience in the industry support that conclusion?

(18) **A Okay. There are really two elements to (19) it. First, let's look specifically at 1992, what was (20) going on. Michael Jordan was at the peak of his (21) popularity. WGN had entered its period of rapid (22) subscriber growth after a not so rapid period after (23) they added the Chicago Bulls. I believe that that had (24) a lot to do with their circulation growth. You had - (25) you were then in a period where the Chicago Bulls were**

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(1) **the national champions of the National Basketball (2) Association.**

(3) **The Atlanta Braves after a period of years (4) is - a not so good team, was the National League (5) champions and doing that, not quite making the World (6) Series until this year, but they did it.**

(7) **So we had two extremely strong attractions (8) that clearly had nationwide appeal. And I think that (9) the operators were cognizant of that, that their (10) subscribers really liked getting access to all of (11) those games, in addition to the White Sox and the Cubs (12) that had their own followings.**

(13) **But in terms of the change, clearly the (14) fortunes of those teams would affect that. And if (15) they both went in a tank a few years from now, I would (16) expect my expectation would be that number would go (17) down. I was pleased to**

see that it had - that our (18) measurement approach had the sensitivity to pick that (19) up. (20) **Secondly, though, let's again think we're (21) in 1992. And the period of the late '80s into the (22) early '90s was a period of substantial increases in (23) the rights fees paid, particularly for sports like the (24) National Basketball Association. The licensing of (25) sports product in this country exploded over this**

#### Page 617

(1) **period. And so we had a great increase in popularity (2) of sports, of both generally and specific teams that (3) were on the signal.**

(4) **The second thing is that - remember this (5) is a relative allocation. Sports goes up. That means (6) that the operators made a conscious decision that (7) something else went down. And if we're talking about (8) the major three categories, we see that syndicated (9) didn't change much, .9 of a point. But movies went (10) down.**

(11) **And I can't give you a causal analysis of (12) this, saying it went down specifically. But we know (13) that we had during that period the various cable (14) networks able to license better packages of both (15) syndicated programming and movies.**

(16) **And so there were more alternatives. (17) Certainly the videocassette revolution had ended up at (18) a very high penetration of people who were renting (19) movies. We had services like American Movie Classics (20) that for years had been sold as a pay service. (21) Remember we talked about pay, you're going to have to (22) pay extra to get it, convert it to basic. So there (23) was more there.**

(24) **So, whether we look at the USA Network or (25) Lifetime or American Movie Classics, there were**

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(1) **certainly more choices available for movies without (2) having to get a distant signal.**

(3) **And so I think that the combination - it (4) was the interplay and combination of the increased (5) supply on the cable systems of movies and the (6) increased popularity of sports and the specific (7) popularity of two real engines of sports in the (8) Chicago Bulls and the Atlanta Braves, that when you (9) begin to meld those factors together - and I can't (10) get into the heads of**

the cable operators who are (11) responding to it. That's why it met my expectations.

(12) That's what I would have anticipated, both (13) a – you know, somewhat of a drop in movies and (14) somewhat of an increase in sports.

(15) Q And how about just the fact that sports as (16) a general matter, putting aside the increase that (17) you've just been testifying about from '89 to '92 on (18) sports and a corresponding decrease on movies? How (19) about just the relative value of sports as compared (20) with movies?

(21) Your survey – and you've gone back to the (22) predecessor's. All consistently show sports as (23) considerably more valuable or more valuable than (24) movies.

(25) In your opinion is that consistent with

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(1) your industry experience?

(2) A Well, let's think about sports. This is, (3) you know, in the category. It's live, live (4) professional and college sports, something that's (5) happening right then. The product can't be any (6) fresher than tonight's game tonight with this year's (7) stars and rookie of the year or whoever is playing.

(8) It is tied into something that's happening (9) on a continuous basis, happening in the sense of (10) they're competing for division championships and (11) eventually league championships. And that's a very (12) evolving kind of programming.

(13) Movies are very attractive. And (14) syndicated series are very attractive programming. (15) But these are, by and large, movies that have already (16) had release in other places, are available in other (17) places, like the video store for the movies.

(18) The series have often run on a network and (19) then been run, had a repeat shown, on a network. And (20) they go out to syndication. And so they're not (21) necessarily new. And they get run fairly frequently.

(22) So I think the difference that we have (23) here is the live nature. It's happening. It's (24) current. And there's an intensity of involvement and (25) a valuing of product that's first run, as opposed to

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(1) very good product and entertaining product that can (2) fill a lot of hours, but it's not first run.

(3) By and large, it's not first run. There (4) is some first run movies and other programming that's (5) produced on these stations, but, by and large, they (6) come from the libraries, film libraries and syndicated (7) programming libraries.

(8) Q Going back to the beginning of your (9) testimony, where you talked about the different types (10) of cable networks and Pay-Per-View channels that a (11) system would carry, it is the case, is it not, that (12) there are substantial other programming options that (13) are typically offered by the system which do carry (14) first run movies, non-distant signalling?

(15) A Yes. And that's – you'll find that in (16) the Pay-Per-View services talking about first run (17) movies. And the pay services increasingly have (18) produced them. HBO produces a lot of movies, and (19) those are first run, although I think people – I'll (20) have to say that the greatest popularity, I believe, (21) is with theatrical releases that have been (22) pre-promoted and pre-sold. (23) It used to be when I would give speeches (24) at the National Cable Convention, that it would (25) emphasize that so much of what they had was pre-sold

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(1) product and so little of what they had was new (2) product.

(3) MR. GERSCH: Okay. Let me ask this (4) question of the Chair. I'm going to go into a new (5) section now. I'm happy to do it now or I don't know (6) whether you want to – when you want to take a break (7) for the day.

(8) CHAIRPERSON JIGANTI: We had agreed to go (9) until 5:30. I think we just took a break not too long (10) ago.

(11) MR. GERSCH: Okay.

(12) CHAIRPERSON JIGANTI: We should easily be (13) able to go to 5:30.

(14) MR. GERSCH: Except –

(15) ARBITRATOR WERTHEIM: Before you go into (16) a new subject, I'd like to ask you a question about (17) Table 11 and this comparison generally you make of '89 (18) and '92.

(19) THE WITNESS: Yes.

(20) ARBITRATOR WERTHEIM: You didn't do a (21) survey for '90, but for '91?

(22) THE WITNESS: A survey was done for '90.

(23) ARBITRATOR WERTHEIM: But there was no (24) data in your testimony?

(25) THE WITNESS: That will be in Mr.

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(1) Trautman's testimony. There were – over a period of (2) 10 different years in which surveys were done, there (3) were 12 surveys. Rather than hit you with all 12 at (4) one time, the approach here was to take '89, which had (5) been subjected to rigorous scrutiny in the '89 (6) proceeding; and then '92, which was the very first (7) survey that incorporated the comments coming out of (8) '89.

(9) So we wanted to focus on that refined (10) survey that reflected the changes and compare it to (11) '89. And then Mr. Trautman will fill in the blanks on (12) '90 and '91.

(13) ARBITRATOR WERTHEIM: Both years '90 and (14) '91?

(15) THE WITNESS: He will be testifying to a (16) large number of surveys, including '90 and '91.

(17) MR. GERSCH: All of the results of all of (18) the JSC surveys are Table 1 to Mr. Trautman's prepared (19) testimony. He gives them all right there.

(20) ARBITRATOR WERTHEIM: Okay. Thank you.

(21) BY MR. GERSCH:

(22) Q Let's turn now to discussion in your (23) testimony with respect to the MPAA's use of the (24) Nielsen data, and particularly this concept of (25) viewing. Have you seen that in other proceedings, a

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(1) viewing hour concept used by MPAA?

(2) A Yes, I have.

(3) Q And this year they changed it a little (4) bit. It's a viewing minute concept. Is that right?

(5) A Well, I see that, yes, they're using (6) viewing minutes. And that has to do with a change (7) from diaries to people meter. But basically it's the (8) same measurement.

(9) It's a measurement of what I call tonnage. (10) In other words, you don't look at the value of the (11) programming. You look at how much. And so a program (12) that appears on a station late at night that has been (13) a movie that's been shown five times previously or (14) it's an old, old black and white series counts as much (15) as a live sports program with hot competitors and (16) prime time. So it's a tonnage measurement.

(17) I must say that the only place in my (18) practice – and I've been in the business since the (19) early '70s – that I ever encountered viewing minutes (20) or – well, viewing

minutes is new - viewing hours (21) and certainly viewing minutes is in this proceeding. (22) It's not used by broadcasters, who do use ratings, but (23) they don't essentially group apples and oranges in a (24) tonnage measurement.

(25) Q Okay. And before we get into what's used

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(1) in it, this tonnage measure, as you say, is the same (2) as in prior proceedings, but although the concept is (3) the same, I take it the methodology is different this (4) time around?

(5) A Methodology is different in terms of the (6) use of the people meter, which essentially takes a (7) continuous reading, rather than a diary. So yes, (8) there are some real differences in methodology, but (9) you end up with the same, basically the same kind of (10) measure, just a different yardstick.

(11) Q Okay. Now, this tonnage, what you call (12) this tonnage measurement or viewing hour, viewing (13) minute concept, this is based on the Nielsen data. Is (14) that right?

(15) A That's correct.

(16) Q And in your experience, putting aside the (17) tonnage notion, do cable operators use Nielsen data in (18) their work?

(19) A Very little. When we work with (20) broadcasters, as we do at the station level and at the (21) group owner level, ratings are important because, (22) remember, they've got one channel. And their revenues (23) and their success is dependent upon your watching that (24) channel, that particular channel.

(25) Cable operator is selling a package. And

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(1) the cable operator is not sensitive to your putting a (2) lot of time watching one or the other. They want the (3) variety. They want to have religious. They want to (4) have public broadcasting. They want to have sports (5) and movies. And they want to have arts. And they (6) want to have news.

(7) And so it would be impossible if you had (8) 60 channels to say, "I'm going to worry a lot about (9) the ratings of" any one. They look a look at it in a (10) very general way but not - it's not part of their (11) business. (12) And when we work with them, I can assure (13) you that we're looking - survey work that we have (14) been contracted to do and that I

have seen done by (15) others talks to the satisfaction or interest of the (16) customer in different types of programming.

(17) And maybe they'll say, "Do you watch it a (18) little bit or frequently?" But taking the ratings and (19) studying the ratings is not part of the basic (20) decision-making process at a system.

(21) Q So the ratings are important to the (22) broadcasters, much less important to the cable (23) operators?

(24) A Ratings are really fundamental to a (25) broadcaster and secondary or tertiary in the

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(1) considerations of a cable operator.

(2) Q Let's go back to the tonnage notion that (3) the MPAA has based its analysis on that's taken from (4) the ratings. Have you ever seen this tonnage notion, (5) as you describe it, used even by broadcasters?

(6) A No, not at all.

(7) Q You have not seen it used by cable (8) operators, and you have never seen it used by (9) broadcasters either?

(10) A It's not a meaningful measure because (11) broadcasters think in day parts. I can tell you that (12) in my work at ABC over the years - and I'm sure at (13) times they kind of hate to see me come in the door (14) again, but in the 17 years that I've been consulting (15) with ABC that one of the big issues is day parts, "How (16) are we doing in daytime? How are we doing in prime (17) time? How are we doing in late night? What's the (18) morning show like?" Those are day parts.

(19) They look at each of those. They have (20) different people that run them. In terms of the (21) ultimate responsibility for programming, it goes by (22) day part. What - when they go out and sell (23) advertising, the advertising rates vary substantially (24) by day part.

(25) I have a table here. I don't recall the

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(1) -

(2) Q It's Table 12 on Page 36. But before we (3) get into that table, I just want to be clear on this (4) point.

(5) This tonnage notion, I take it from your (6) testimony the difficulty there is the tonnage notion (7) counts each hour viewed as an identical value to the (8) next?

(9) A That's right. If someone is viewing an (10) hour at 1:00 a.m., somehow or another, they say that

(11) has the same value to the cable operator.

(12) Q Okay. And you've got this table here that (13) talks about what in the broadcast field, where they do (14) use Nielsen ratings - how do the broadcasters treat (15) those ratings? I mean, do they weight each hour the (16) same the way the MPAA's tonnage approach does?

(17) A No, they don't. Let's take a look at (18) Table 12. And that's on Page 36. Now we use here (19) something called cost per 1,000. I don't know if (20) you're familiar with that, but that says you're (21) selling advertising. What is the rate that you charge (22) the advertiser per 1,000 viewers, per 1,000 viewers? (23) So we're talking about 1,000 viewers. (24) When you take a look at these numbers, (25) what you see - and this was taken from Nielsen there

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(1) - that you've got the rates for the various day (2) parts. And they vary substantially.

(3) Now, let's take a look at the top 20 (4) markets. It's not important which of those columns (5) except to show you that it varies in all. For an (6) advertiser to buy access for 1,000 viewers in prime (7) time, they'll pay \$13.36. That will get them access (8) to 1,000 viewers. If they're going to buy access in (9) the early morning or daytime, they'll pay only four (10) dollars for the same viewer.

(11) So, quite clearly, to the broadcaster a (12) minute, having access to a viewer is dependent upon (13) the time of day. And that's why I say that adding (14) tonnage up viewing minutes, not distinguishing by day (15) part values is just not done. It's just not done in (16) the industry.

(17) Q So even for the broadcasters -

(18) A Even for the broadcasters.

(19) Q - to use Nielsen ratings -

(20) A Even for the broadcasters.

(21) Q - for meat and potatoes, they wouldn't (22) use a tonnage notion?

(23) A That's right.

(24) Q Okay. Let's come back now to the cable (25) industry. And I wonder if you can talk about, again,

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(1) why it is that Nielsen ratings of any kind are less (2) important to the cable industry, especially with (3) reference to where it is that the cable operators are (4) getting their revenue.

(5) A Let me first correct. I misspoke in terms (6) of the source of the cost per 1,000 data. And, as

we (7) indicate in the report, it's from the Media Market (8) Guide, which is widely used in broadcasting based upon (9) the Nielsen designated market areas. I said that this (10) was Nielsen data. This was not Nielsen data. It was (11) from the Media Market pack.

(12) The cable operator certainly has some idea (13) as to whether a channel might get a .3 rating or get (14) a .7 rating, but they don't go into their valuation (15) and negotiation based upon that. Let me give you an (16) example.

(17) First of all, I think you'll find that Mr. (18) Gerbrandt's testimony goes right to this point in (19) detail. And I'm familiar with it, but I'll let Mr. (20) Gerbrandt testify to it.

(21) Where they take a look at what in the (22) marketplace cable operators are willing to pay and (23) relate that - cable network. And they relate that to (24) viewing. And what it shows is that there's a big (25) discrepancy. It's not related just to viewing. It's

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(1) related to what, viewing what, that viewing sports, (2) for example, is worth more to an operator than viewing (3) some other kind of program. Mr. Gerbrandt will (4) testify to that.

(5) An example that we are very (6) well-acquainted with because I spend a fair amount of (7) my time negotiating, assisting local franchises in (8) negotiating media deals on what we call regional (9) sports networks - these, again, are cable networks, (10) not distant signals.

(11) So a team might put some of its games on (12) a broadcast station and then put 30 games on a sport (13) network, say, here in this area a Home Team Sports, (14) which carries the Caps and the Bullets. In fact, (15) that's mainly where you're going to find them is on (16) cable. (17) What we have found is that the cable - (18) two things. Number one, the ratings of these networks (19) are generally very low. And when we look at ratings (20) across a whole bay or if it's not, say, a Caps game or (21) an Orioles game or a Bullets game, very, very low (22) ratings. (23) Yet, for a relatively few hours of (24) programming, the Caps and Bullets - I don't know the (25) precise number, but maybe 30 games apiece on. So a

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(1) basketball game is two and a half

hours. Thirty games (2) will get you to 75 hours. I don't know how many (3) Orioles games, but multiply that by three hours for a (4) baseball game.

(5) And you add that up. We're only talking (6) about a few hundred hours of programming. And the (7) rest of the ratings are really in the pack. Now, if (8) they're looking at ratings, they say, "Well, I average (9) out. I add up the tonnage the way that the MPAA adds (10) up the tonnage. It doesn't add up to much. I'm not (11) going to pay much." (12) Fact is that the regional sports networks (13) are one of the most expensive networks that's licensed (14) by a federal license by cable operators. And that (15) happens in a marketplace negotiation. And most of the (16) cable, regional cable, sports networks that we see get (17) anywhere from 25 cents to upwards of a dollar a month (18) per subscriber as a license fee negotiated in the (19) marketplace and only have a little bit of programming (20) that - so if we added up their tonnage and compared (21) their tonnage to any one of a number of other cable (22) channels, you'd say, "Well, no way you're going to pay (23) 50 cents a month to get this." But again it comes (24) back to what I said about the intensity of sports. (25) In the Denver area we have Rocky Mountain

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(1) Prime Sports. It carries the Denver Nuggets and the (2) Colorado Avalanche and almost very little besides that (3) of a local nature.

(4) And the rest is what we call filler (5) programming, very low rated, often too low to measure. (6) What you'll see is a "couldn't measure it," a blank in (7) the ratings book or an answer that's "too low to (8) measure." (9) But they do have 32 or 33 or 45 Nuggets (10) games and about the same number of Avalanche games. (11) And the cable operator pays a lot of money for it.

(12) So tonnage - cable operator obviously (13) didn't calculate tonnage in making that decision (14) because the tonnage of a regional sports network is (15) real low. It is something else.

(16) And that's what we're trying to get at (17) when we say to a cable operator, "Make this allocation (18) decision for us" because we know that that there are (19) a number of

factors.

(20) Maybe, you know, deep in there, one of a (21) number of elements has to do with ratings. But, (22) believe me, there are many instances, the ones I've (23) given you, the ones that Mr. Gerbrandt will give you, (24) that show in the marketplace it's not a tonnage basis.

(25) Q And in the marketplace what you find is

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(1) that sports is valued at a substantial multiple of (2) just what its viewing share would be. Is that right?

(3) A Absolutely. We find that often. And when (4) we negotiate for local themes, we know and will often (5) advise our clients that, you know, the demand is so (6) high, the value is so great that this regional sports (7) network will pay you much more than the incremental (8) revenue than they get for carrying it because guess (9) what?

(10) If they don't have you - if Home Team (11) Sports didn't have the Orioles and didn't have the (12) Caps and the Bullets and they just had - ran this (13) other stuff, there are a lot of systems that wouldn't (14) carry them.

(15) And that's why you find that in your (16) survey results a 38.8 percent share of the royalties (17) were of - the value that you get for 1992, that's why (18) that in your judgment is consistent with the reality (19) of the -

(20) A Well, yes.

(21) Q - cable marketplace?

(22) A That's right. And, as I say, the - if (23) you look at the sum of the numbers, I mean, and - (24) what the survey tells us is, you know, they say sports (25) and then movies and syndicated, kind of close. If you

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(1) add these 2 together, you get up to 41. This is 39, (2) about the same.

(3) That's very close to my expectation (4) because I don't mean to say that sports is the be all (5) and the end all of cable programming. What I am (6) saying is that sports as a category is quite (7) comfortable for me to say that as a category, it's as (8) valuable as movies and syndicated combined. And I (9) think there are arguments that it might even be more (10) so.

(11) Q And this study that you've done in your (12) survey, is that perfect? Are there no criticisms that (13) can be made of it?

(14) A No. I mean, I hope I made

clear from the (5) beginning that we look for the best way to try and do (16) something that would assess the relative value to (17) these cable operators who are paying the money in. (18) The only real way to get the number is to have an open (19) market for it. We don't have an open market for it. (20) So there's no way to do it.

(21) But we looked at the variety of different (22) ways to estimate this. And we think, you know, it's (23) imperfect in different areas. And there are - you (24) would like to have something that's perfect, but we're (25) - we can't simulate a real world negotiation, which

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(1) would take place between thousands of cable systems (2) and their multiple system operators at some level.

(3) Q You don't have the seller's perspective as (4) -

(5) A We don't have that. We can't get that. (6) So we looked at the alternatives. And we feel given (7) various imperfect measures, this is pretty good (8) because it fits the industry.

(9) It fits the nature of the industry and how (10) it approaches buying programming. It's consistent (11) with that, rather than creating a measure that fits (12) neither broadcasting nor cable, which is the tonnage (13) measurement.

(14) ARBITRATOR FARMAKIDES: Have you ever (15) tried to simulate the industry?

(16) THE WITNESS: No. I don't think you can (17) simulate what would happen other than through this (18) kind of technique. This is the best that we can do. (19) And I'll admit it's imperfect.

(20) Who knows exactly what the number is? But (21) we have a history here of different entities (22) conducting surveys, in one case MSOs, other cases at (23) the system level using this technique and that (24) technique and different formulations of certain (25) questions.

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(1) And there's a certain consistency you'll (2) see in Mr. Trautman's review, these past studies, that (3) says, you know, "That's pretty good." And then when (4) I look at it and I say, you know, "Don't even tell me (5) the numbers." I say, "Gee, with WGN and the Chicago (6) Bulls in '92 and not there in '89, I think sports are (7) going to be more valuable." And guess what? They (8) went up a few points. I say, "Well, that's

a pretty (9) good measurement."

(10) ARBITRATOR FARMAKIDES: In other words, (11) you're saying that through utilizing computer systems, (12) you're really not able to make the necessary (13) assumptions and to take the relative data and come up (14) with a simulation?

(15) THE WITNESS: No. I'm not aware of any (16) simulation that would be credible. And certainly the (17) viewing data being just one element of many in a cable (18) operator's thinking is quite inadequate.

(19) So in the absence of having any good - I (20) mean, the comfort with that is there are a lot of (21) numbers. It gives you a comfort to go to the Nielsen (22) and add up all of these numbers.

But the fact is that (23) what we're really trying to simulate is (24) decision-making by a cable operator.

(25) And we go right to the decision-making by

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(1) a cable operator, which incorporates viewing of (2) households. But we don't base the whole puppy on (3) viewing of households.

(4) BY MR. GERSCH:

(5) Q Just one more question, Mr. Bortz. And (6) that is: When you go to the cable operator, your (7) system, with whatever imperfections are necessarily (8) there because you're trying to estimate something that (9) doesn't really occur in the free marketplace, your (10) system of going to the cable operators, is there any (11) reason to believe that that is biased in favor of the (12) Joint Sports Claimants?

(13) A Not at all. We've done a number of things (14) to make sure that there is nothing there that would (15) bias it in terms of the Claimants.

(16) MR. GERSCH: No further questions.

(17) ARBITRATOR WERTHEIM: Mr. Bortz, you're (18) giving me a lot of confidence in these great economic (19) models that model the country's entire economy and all (20) kinds of -

(21) THE WITNESS: The disappearance of the (22) deficit?

(23) ARBITRATOR WERTHEIM: - major decisions (24) you made on them. And you're telling us that we can't (25) realistically even have a good model of a single

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(1) industry.

(2) THE WITNESS: Well, I think that when you (3) combine certain factors, - one is this was one (4) attempt to get the views of operators - I think that (5) you'll find in Mr. Gerbrandt's testimony

his analysis (6) of what has happened in the marketplace, where we can (7) go out and say, "Okay. Let's look at those cable (8) networks. That's as close as we can get to distant (9) signals." And we know those cable networks negotiated (10) in the marketplace.

(11) Now, we can't come up with a precise (12) number from that, but if we take a look at it and say, (13) "Does it appear when you analyze that?" that having a (14) lot of sports content allows you to get a much higher (15) license fee, that's marketplace. And you'll be (16) hearing about that.

(17) CHAIRPERSON JIGANTI: At this stage we'll (18) take our recess. We'll meet tomorrow morning again at (19) 9:30. Thank you, counsel.

(20) (Whereupon, the foregoing matter was (21) recessed at 5:33 p.m., to be reconvened on Thursday, (22) December 7, 1995 at 9:30 a.m.)



## Look-See Concordance Report

UNIQUE WORDS: 3,002  
TOTAL OCCURANCES: 17,168  
NOISE WORDS: 385  
TOTAL WORDS IN FILE: 49,851

SINGLE FILE CONCORDANCE

CASE SENSITIVE

INCLUDES ALL TEXT OCCURRENCES

IGNORES PURE NUMBERS

WORD RANGES @ BOTTOM OF PAGE

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